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IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

MAX G. COHEN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

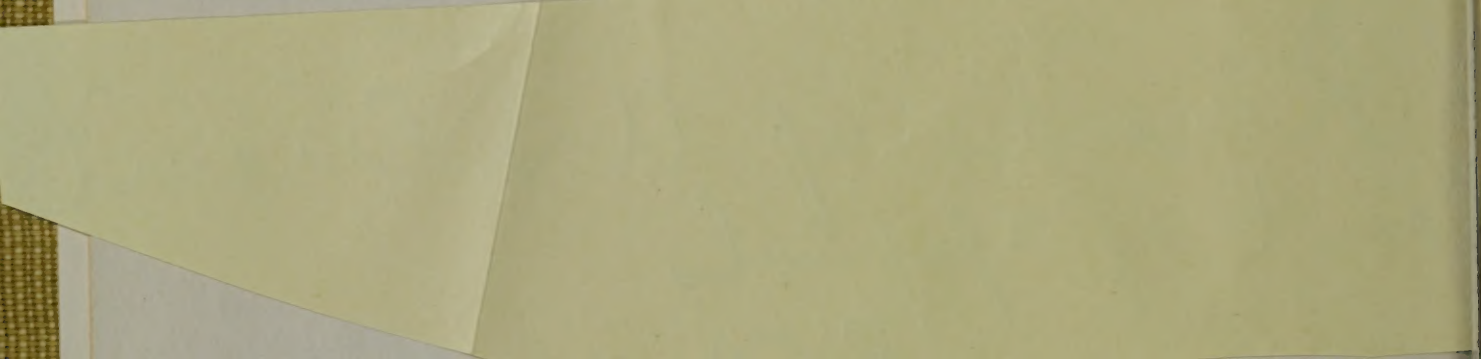
Writ of Error to the United States District Court
for the District of Oregon.

TRANSCRIPT OF RECORD.

FILED

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Court of appeals
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No. 2239

IN THE
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NINTH CIRCUIT

MAX G. COHEN,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

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**Writ of Error to the United States District Court
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IN THE
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MAX G. COHEN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Names and Addresses of Attorneys
upon this Writ:**

For Plaintiff in Error:

Ralph E. Moody, Roscoe C. Nelson, Thomas Mannix,
all of Portland, Oregon.

For Defendant in Error:

Clarence L. Reames, U. S. Attorney,
Portland, Oregon.

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*In the District Court of the United States for the
District of Oregon.*

Be it Remembered, that on the 26 day of November,
1912, there was duly filed in the District Court of
the United States for the District of Oregon, an
Indictment, in words and figures as follows, to
wit:

[Indictment.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

UNITED STATES OF AMERICA,

District of Oregon—ss.

The Grand Jurors of the United States of America
for the District of Oregon, duly empaneled, sworn and
charged to inquire within and for the said district,
upon their oaths and affirmations do find, allege and
present:

That on to-wit, the 9th day of May, 1912, there
came on to be tried before the Honorable Anderson
M. Cannon, United States Commissioner for the Dis-
trict of Oregon, a certain issue in due manner joined
between the United States of America and Jake Gro-
nich upon a certain charge and complaint then and
there pending before the said United States Commis-
sioner against him, the said Jake Gronich, for a viola-
tion of the White Slave Traffic Act, which said com-

plaint charged that the said Jake Gronich had theretofore on or about the 8th day of April, 1912, at Cleveland in the state of Ohio, unlawfully, knowingly and feloniously procured and obtained a ticket and ticket and form of transportation and evidence of right thereto to be used in interstate commerce by a woman to-wit, Esther Wood, in going from the said Cleveland in the state of Ohio, to Denver in the state of Colorado, and from said Denver in the state of Colorado, to Portland in the state and district of Oregon and within the jurisdiction of this court, for the purpose of prostitution and debauchery and for an immoral purpose, to-wit, that she the said Esther Wood should live with him the said Jake Gronich as his concubine whereby the said woman, Esther Wood, was transported in interstate commerce from Cleveland in the state of Ohio to Denver in the state of Colorado and from Denver in the state of Colorado to Portland in the state of Oregon.

That before the trial of said issue, the defendant herein, Max G. Cohen, and on or about the 7th day of May, 1912, at Portland in the State and District of Oregon, did unlawfully, knowingly, feloniously and corruptly procure, advise, obtain and suborn one Esther Wood, to appear as a witness at the trial and hearing of said cause for the United States, and to give in evidence before the said United States Commissioner, certain matters material and relevant to the issue in substance and to the effect following to-wit:

That she the said Esther Wood had never practised prostitution in Baker, Oregon, and that she the said Esther Wood had never practised prostitution any place in the United States, and that she, the said Esther Wood had never practised prostitution in Portland, Oregon, and that she the said Esther Wood had never practised prostitution in Denver, Colorado, and that she the said Esther Wood did not remember having ever received certain postal cards theretofore sent to her by the said defendant, Jake Gronich, and that she the said Esther Wood did not remember or recollect having written or mailed certain postal cards sent to and received by the defendant, Jake Gronich.

And that afterwards, on to-wit, the 9th day of May, 1912, the said issue was tried and heard before the said United States Commissioner and the said Esther Wood appeared as a witness on behalf of the United States and was duly sworn by the said United States Commissioner, who was then and there an officer authorized by the laws of the United States to administer oaths, and took her oath as such witness before the said United States Commissioner that the evidence which she, the said Esther Wood would give at said trial and hearing, would be the truth, the whole truth and nothing but the truth; and it did then and there upon said issue, trial and hearing, become and was a material inquiry whether she, the said Esther Wood had ever practised prostitution in Baker, Oregon, and whether she, the said Esther Wood, had ever practised prostitution in Portland, Oregon, and

whether she the said Esther Wood, had ever practised prostitution in Denver, Colorado, and whether she, the said Esther Wood, had ever practised prostitution any place in the United States, and whether she, the said Esther Wood remembered having received a postal card theretofore sent to her by the defendant, Jake Gronich, which said postal cards were then and there exhibited to the said Esther Wood, and whether she, the said Esther Wood did remember or recall having written or mailed certain postal cards theretofore sent to and received by the defendant, Jake Gronich; and that the said Esther Wood, so being sworn and having taken her oath aforesaid, upon the 8th day of May, 1912, at Portland aforesaid, and upon the trial and hearing of said issue of said cause, did wilfully, corruptly and knowingly and contrary to her said oath, swear and depose before the said United States Commissioner, and in said United States Commissioners' Court amongst other matters material to the said inquiry, in substance and to the effect following, that is to say:

That she the said Esther Wood, had never practised prostitution in Baker, Oregon, and that she the said Esther Wood, had never practised prostitution in Portland, and that she the said Esther Wood had never practised prostitution in Denver, Colorado, and that she, the said Esther Wood had never practised prostitution at any place in the United States, and that she the said Esther Wood did not remember having received certain postal cards theretofore sent

to her by the said defendant, Jake Gronich, and then and there exhibited to said Esther Wood; and that she the said Esther Wood did not remember or recollect having written or mailed certain postal cards theretofore sent to and received by the defendant, Jake Gronich, and then and there exhibited to the said witness, Esther Wood,

WHEREAS, in truth and in fact it was not and is not true and at the time of so swearing and deposing, the said Esther Wood did not believe it to be true that she had never practised prostitution in Baker, Oregon, and that she the said Esther Wood had never practised prostitution in Portland, Oregon, and that she the said Esther Wood had never practised prostitution in Denver, Colorado, and that she the said Esther Wood had never practised prostitution at any place in the United States, and that she the said Esther Wood did not remember having received certain postal cards theretofore sent to her by the said defendant Jake Gronich, and then and there exhibited to her, the said witness on the witness stand, and that she the said Esther Wood did not remember or recollect having written or mailed certain postal cards theretofore sent to and received by the defendant, Jake Gronich, and then and there exhibited to the said witness, and

WHEREAS, in truth and in fact the said Esther Wood had practised prostitution in Baker, Oregon, and the said Esther Wood had practised prostitution in Portland, Oregon, and that the said Esther Wood

had practised prostitution at divers points and sundry places in the United States, namely, at Denver, in the state of Colorado, and at Astoria in the state of Oregon, and that she the said Esther Wood did remember receiving certain postal cards theretofore sent to her by the said Jake Gronich, and then and there exhibited to her, and the said Esther Wood did remember and recollect having written and mailed certain postal cards theretofore sent to and received by the said Jake Gronich, and then and there exhibited to her the said Esther Wood, all of which said matters the said Esther Wood then and there well knew.

WHEREAS, in truth and in fact, the said Max G. Cohen at the time he procured, advised, obtained and suborned the said Esther Wood, well knew that she, the said Esther Wood, had practised prostitution in Baker, Oregon, and well knew that she, the said Esther Wood had practised prostitution in Portland, Oregon, and well knew that she the said Esther Wood had practised prostitution at divers and sundry places in the United States, to-wit, at Astoria, Oregon, and at Denver, Colorado, and well knew that she, the said Esther Wood did remember having received certain postal cards theretofore sent to her by the said Jake Gronich, and which said postal cards were at the time of the trial of said cause, exhibited to the said witness, Esther Wood, and well knew that she, the said Esther Wood did remember and recollect having written and mailed certain postal cards theretofore

sent to and received by the said Jake Gronich, which said postal cards were then and there at the trial and hearing of said cause, exhibited to the said witness; and so the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do charge, allege and present, that Max G. Cohen, on or about the 7th day of May, 1912, did unlawfully, knowingly, corruptly, wickedly and maliciously suborn, obtain, procure and advise the said Esther Wood to commit wilful and corrupt perjury in and by her oath aforesaid before the said United States Commissioner so sworn and taken before the said Honorable Anderson M. Cannon, United States Commissioner aforesaid, as to a matter and matters material to said issue, which said matter and matters the said Esther Wood did not believe to be true as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 23rd day of November, 1912.

A True Bill.

GEO. POPE,
Foreman U. S. Grand Jury.
ROBERT F. MAGUIRE,
Assistant U. S. Attorney.

[Endorsed]: Indictment. Filed Nov. 26, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 23 day of January, 1913, there was duly filed in said Court, a Demurrer to Indictment, in words and figures as follows, to wit:

[Demurrer to Indictment.]

*"In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

Comes now the defendant and demurs to the indictment herein upon the grounds:

I.

That more than one crime is attempted to be charged in said indictment, and said indictment consisting of one count.

II.

That the said indictment fails to state facts sufficient to constitute a crime.

III.

That the facts stated in the indictment do not constitute a crime.

RALPH E. MOODY,

Attorney for the Defendant.

I, Ralph E. Moody, attorney for the defendant herein, hereby certify that I have read the foregoing demurrer to the indictment herein, and that in my opinion the same is well founded in law.

Dated at Portland, Oregon, this 30th day of October, 1912.

RALPH E. MOODY.

[Endorsed]: Demurrer. Filed Jan. 23, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 8th day of February, 1913, the same being the 82 Judicial day of the Regular November Term of said Court; Present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

*"In the District Court of the United States for the
District of Oregon.*

No. 5829. February 8, 1913.

Indictment: Sec. 215 P. C.

THE UNITED STATES,

v.

MAX G. COHEN,

This cause heretofore submitted upon demurrer to the indictment herein, came on regularly at this time for the ruling and decision of the Court whereupon after due consideration, it is Ordered that said demurrer be and the same hereby is overruled.

And afterwards, to wit, on Monday, the 17 day of March, 1913, the same being the 13 Judicial day of the Regular March Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Plea to Indictment.]

*In the District Court of the United States for the
District of Oregon.*

No. 5829

Indictment: Sec. 126 P. C.

THE UNITED STATES OF AMERICA,

v.

MAX G. COHEN.

Comes now the United States by Mr. George O. Mowery, the defendant appearing in his own proper person; whereupon for plea to said indictment charging the said defendant with violation of Section 126 of the Federal Penal Code the said defendant says he is not guilty.

And afterwards, to wit, on Wednesday, the 4th day of June, 1913, the same being the 81 Judicial day of the Regular March Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Minutes of Trial—Verdict of Jury.]

*In the District Court of the United States for the
District of Oregon.*

No. 5892

Indictment: Sec. 126 P. C.

THE UNITED STATES,

v.

MAX G. COHEN.

This cause came on regularly for further trial at

this time, pursuant to continuance, jury, attorneys for respective parties and defendant present as heretofore; whereupon Thomas Mannix, S. Abrams, D. Solis Cohen, W. M. Cake, A. G. Rushlight, S. Sichel, N. W. Roundtree, R. W. Schmeere, E. D. Connell, B. F. Boington, E. Lansing, J. F. Kerchma, and F. Collier were sworn and examined as witnesses on behalf of the defendant and thereupon evidence closed and thereupon defendant moves the Court for an order directing a verdict of not guilty and thereupon said motion having been duly argued and submitted, after due consideration, it is Ordered that said motion be and the same hereby is overruled, and thereupon after argument of counsel for respective parties and instructions of the Court the jury retire to consider of their verdict; and thereupon the jury having agreed return into Court their verdict as follows, "We, the jury duly empaneled, sworn and charged to try the above entitled cause, do find the defendant Guilty in manner and form as charged in the indictment. Dated at Portland, Oregon this 4th day of June, 1913. Hugh Cosgrove, Foreman" which said verdict is received by the Court and ordered filed and thereupon it is ordered that said defendant be admitted to bail in the sum of \$5000.00 and thereupon on motion of defendant it is Ordered that the defendant have and hereby is granted thirty days from date hereof within which to serve and file motion for new trial.

And afterwards, to wit, on the 4 day of June, 1913, there was duly filed in said Court, a Verdict, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

No. 5829

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

We the jury duly empaneled, sworn and charged to try the above entitled cause, do find the defendant guilty in manner and form as charged in the indictment.

Dated at Portland, Oregon, this 4th day of June, 1913.

HUGH COSGROVE,

Foreman.

[Endorsed]: Verdict. Filed June 4, 1913.

A. M. CANNON,

Clerk.

By F. H. DRAKE,

Deputy.

And afterwards, to wit, on Monday, the 4th day of August, 1913, the same being the 25 Judicial day of the Regular July Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Judgment.]

*In the District Court of the United States for the
District of Oregon.*

No. 5829

Indictment: Sec. 126 P. C.

THE UNITED STATES,

v.

MAX G. COHEN.

Comes now the United States by Mr. C. L. Reames, United States Attorney, the defendant, Max G. Cohen, appearing in his own proper person and by his attorney Mr. R. E. Moody; whereupon, this being the time set for the passing of sentence, upon motion of the United States for Judgment, it is Considered, Ordered and Adjudged that the said defendant, Max G. Cohen, be imprisoned in the United States Penitentiary at McNeil's Island, Washington, for the term of two years and that he pay a fine of \$100.00 and that he remain imprisoned in said penitentiary until said fine is paid or until he is otherwise discharged by law, and thereupon it is Ordered that issuance of commitment herein be and hereby is stayed for thirty days from the date hereof and that defendant be admitted to bail in the sum of \$10,000, and it is further ordered that defendant have and hereby is granted 30 days from the date hereof within which to serve and submit a proposed bill of exceptions herein.

And afterwards, to wit, on the 16 day of September, 1913, there was duly filed in said Court, a Bill of

Exceptions in words and figures as follows, to wit:

[Bill of Exceptions.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

Be it Remembered, That on the 2nd day of June, 1913, the above entitled cause came on to be heard before the Hon. Robert S. Bean, District Judge of the above-entitled court, the said Max G. Cohen being then and there charged with the crime of subornation of perjury; and the said trial continuing from day to day up to June 4th, 1913, at which time the said cause was submitted to the jury; and the said jury thereafter rendered a verdict finding the defendant guilty.

Clarence L. Reames, United States District Attorney for the District of Oregon, and George Mowry, Assistant United States Attorney, appeared on behalf of the government, and Ralph E. Moody appeared on behalf of the defendant.

The facts alleged in the indictment as the basis of the charge were that the said defendant, Max G. Cohen, on or about May 7th, 1912, suborned one Esther Wood to commit wilful and corrupt perjury, contrary to her oath, before United States Commissioner Anderson M. Cannon, as to matters claimed and

charged in said indictment to be material in said issue, which said evidence so testified to by the said Esther Wood was false and untrue, and known to be false and untrue by the said Esther Wood at the time she so testified, and known to be false and untrue by the said Max G. Cohen at the said time he suborned the said witness Esther Wood to commit said perjury; the said matters to which the said Esther Wood so testified before the said Commissioner were that she, the said Esther Wood, had never practised prostitution in Baker City, Oregon, or in Portland, Oregon, or in Denver, Colorado, or in any other place in the United States, and that the said Esther Wood did not remember having received certain postal cards which it was charged had passed between the said Esther Wood and the said Jake Gronich; and the indictment further charged that said false testimony on the part of the said Esther Wood was given by her in a certain proceeding and a certain issue joined between the United States of America and Jake Gronich upon a charge pending before said United States Commissioner against the said Jake Gronich for an alleged violation of the White Slave Traffic Act; the said Jake Gronich being charged before said Commissioner with having transported the said Esther Wood from Cleveland, Ohio, to Denver, Colorado, and thence to Portland, Oregon, and with having purchased for her the railway tickets upon which she so travelled, and that he, the said Jake Gronich, so transported her for the purpose of prostitution and debauchery, and for an

immoral purpose, to wit:—that she, the said Esther Wood, should live with him, the said Jake Gronich, as his concubine.

The following exceptions were duly taken and allowed at the trial of the above-entitled cause:—

I.

An exception was duly taken and allowed to the refusal of the court to direct the jury to return a verdict of not guilty in the above entitled cause, upon the following grounds:—

I.

That no evidence has been introduced in the trial of said cause upon which a verdict of guilty can be based.

II.

The evidence which has been introduced in this cause is not sufficient to be the basis of a verdict of guilty.

III.

That the evidence fails to show that any crime has been committed by this defendant.

IV.

That the evidence is not sufficient to show that the defendant has committed the crime set forth in the indictment in this cause.

To illustrate this exception, the following evidence was given at the trial aforesaid.

ESTHER WOOD, a witness called by the government, testified in substance, so far as material to this

exception, as follows:—

I live at the Levens Hotel in Portland. My occupation is that of a sporting girl, and has been for the last three years, including the 9th day of May, 1912, in Portland. I practised prostitution in Baker in June and July, 1911; I went away for two months; then came back and remained for six weeks; and I lived in a crib at 1783 Auburn Avenue, practising prostitution all of that time and for two months after June, 1911, and I was in Baker City two months, and I lived in a crib at 1783 Auburn Avenue practising prostitution all that time and for two months after June, 1911. I practised prostitution in Portland for the first time in 1911 in the month of December, at the house of Sadis Parker, and at the Uncle Sam Hotel at 5th and Couch streets for about two weeks. I practised prostitution in May, 1912, at 82½ Third street, which is in the North end of Portland. That was about the 3rd or 4th of May, for only one day. In Denver I practised prostitution for two weeks in the spring of 1911, and for about two weeks in the fall of 1911, and for about two weeks in April, 1912. At the latter time May Swindle, Joe Albin, and my husband, Mr. Kramer,—known as Jake Gronich,—were with me.

On May 6th I lived with my husband, Jake Gronich, at the Levens Hotel, having come to Portland about a week before with my husband, Jake Gronich, and this May Swindle, and Joe Albin; and I had lived with him for three years prior to the 6th of May. He

was arrested on the 6th of May. At the time I was out with a girl named Rose Heller, and when I came back to the Levens hotel, the proprietor there, Mrs. Levens, told me that my husband had been arrested that night and that the detectives were waiting for me. She called up Rose Heller, and I spent the night at Rose Heller's room at the Oxford Hotel, room 3, arriving there between 12 and 1 in the early morning of May 7th, and I stayed there that night and the next day, being arrested on the night of the 8th.

I saw Mr. Cohen on May 7th at the Oxford Hotel in Miss Heller's room, about a quarter after 5. When he came in, I was in the room with Sadie Parker, Rose Heller, and Violet Woods. I wasn't quite sure who sent for him. When he came in I was lying on the bed feeling bad and crying, and as he entered he said, "Well, well, what is this all about?" and Sadie Parker told him that I was the girl with the two Jewish fellows who had been arrested at the Levens Hotel, whereupon Mr. Cohen mentioned Gronich and Albin, and said he had seen them that morning and that they had been turned over to the government, and were represented by Dawley, a negro lawyer with whom Cohen said he declined to be connected. Then Cohen asked me if I was married to Jake Gronich, and I hesitated about answering, but Sadie Parker told me that Mr. Cohen was my lawyer, and that I should tell him the truth, and I then told him that I was married, and had been in Portland a little over a week. I told him that I had sported in Portland one day, and

he said, "Oh, well, they won't find that out." Sadie Parker then told Mr. Cohen, calling him by his first name, that I had worked for her a little over two weeks the preceding winter, and Mr. Cohen told Sadie that she wouldn't have to tell that. Then he said, "They have to prove that she is a sporting girl."

Mr. Cohen then asked me whether I had any telegrams or letters in my trunk, and I told him that I didn't have any; that all I had consisted of postal cards at different places where I had worked, and he told me, "Well, if they should show you those, just say you don't remember." Mr. Cohen asked me if I came direct from Cleveland here, and I told him that May and I had stopped in Denver and had a sporting house together, and Sadie Parker said that if they scared May, she would tell the truth and get me up for perjury, and I asked the meaning of perjury, and Sadie Parker said to tell a lie. And Mr. Cohen said, "She can deny that she ever sported", and then he said that when they took me down I should see May, because if May told that she and I had sported together, I could say that I did sport, but that I was not brought here for immoral purposes, and when I sported I did it of my own free will; and if May didn't tell I could deny that I sported.

Sadie Parker then asked Mr. Cohen if he didn't think it best for me to leave town so they could not get me, and Mr. Cohen said No, that I might as well go down and give myself up; that they were bound to get me. Then Mr. Cohen said, "Now, I will give you

my card, and in case they do take you, call me up no matter what time it is; you call me up when they come down to take you", and he wrote down his 'phone number and gave me his card.

I told him I had some postal cards in my trunk from different places where I had sported, and he said, "When they show you, then just say that you don't remember". He went away just before 6, leaving his card, and saying that he had his machine and was going home to supper. I was arrested late that same night about half past 10 at the same room in the Oxford Hotel, and was taken to the city jail. Mr. Cohen told me at that time that he had a good stand in with the Government people, and he mentioned the name of assistant district attorney Evans. I told Mr. Cohen at that time that I had practised prostitution in Baker, Oregon, and also in Denver, Colorado, and that May and I had had a house together.

I didn't call Mr. Cohen that night, but I saw him the next morning at the city jail, and he wanted to know if May was there, and I told him she wasn't, and he said that they would take me up that morning and that I shouldn't talk until he got there, and should be sure and stick to my story. He asked me whether I was married, and I told him the name under which I was married, and where I was married, and he wrote it down; and he asked me was I sure that I had been married in the court house. I told him that I was, and was married by the squire. He then said that they would have to prove that I was a sporting woman,

and said, "Well, they have to prove that you are a sporting woman", and that I could deny it, and could deny I had ever been a sporting woman." Mr. Cohen then told me to deny that I ever was a sporting woman. He then said that if I saw May down there, and she should say that I worked with her in Denver, that I should say Jake Gronich didn't bring me here for immoral purposes, and what I did, I did of my own free will.

I was taken down here to the post office that morning and put in a room and sworn. I told them I refused to answer and wanted to see my attorney, Mr. Cohen. I didn't testify that day, and they took me back. First Mr. Cohen came in and spoke there for a while, and then I went into the hall, and he asked me did I talk, and I told him No, and he said Good. Then he asked if he could see Mr. Pray a moment, and Mr. Pray told him to come around to his office, and Mr. Cohen told Mr. Pray there that I was married to Jake Gronich. Mr. Pray is one of the government men. I didn't testify at all that morning, and they took me back to the city jail. I saw Mr. Cohen the next morning at the city pail. He was in very much of a hurry and told me to stick to my same story, and asked me had I seen May. I told him No. They brought me back to the post office building in the morning of that same day, after I had seen Mr. Cohen, taking me to a different room; but I wasn't sworn that morning, and they took me back to the city jail. I saw Mr. Cohen at the city jail that noon, and he told me to stick to my

same story, and that they would have the preliminary hearing at some time that afternoon, and he told me not to talk until he got there.

They brought me back to the post office building that same afternoon, and put me on the stand, Mr. Cohen being present, and I testified that afternoon of May 9th just as Mr. Cohen advised me to tell. They asked me had I ever practised prostitution in Baker, and I told them No, knowing at the time that I had, as a matter of fact, practised prostitution in Baker, and so testifying because Max Cohen advised me to. They asked me whether I practised prostitution in Denver. I said No, knowing as a matter of fact that I had, and so testifying because Mr. Cohen advised me to. They asked me had I ever practised prostitution at any place in the United States. I told them No, knowing that it was untrue, and that I was swearing falsely; and they asked me had I ever practised prostitution in Portland, and I told them No, knowing that I had, and so testifying because Mr. Cohen advised me that way, and said it was the only way to save Jake Gronich, because they found the tickets on him.

At that examination they exhibited the postal cards to me, which I recognized, and the one now shown me is one of them. It was sent me by Jake Gronich, from Canton, Ohio, and received by me in Denver, Col. (Postal card marked Government's Ex. 4). I also recognize this card, which was shown to me at that examination and which was received by me in Port-

land, Oregon, from Jake Gronich. They asked me at the examination had I ever seen this card, and I said once No, and then I said that I didn't remember, and I knew I had seen the card before and was swearing falsely. I so testified because my lawyer advised me to.

Another card was shown to me, which is in my own handwriting, and they asked me whether it was my handwriting, and I told them No, and then I told them that I didn't remember; and when they asked me had I ever seen the card before, I told them that I didn't remember. I knew at the time that I had seen it before, and did remember it, but I so testified because my attorney advised me to. The Max G. Cohen I have spoken of as my attorney is the defendant here.

When I was called before the Commissioner I gave the name of Esther Wood, and when they asked me if that was my right name, I said No, my right name was Grace Reimers, which is my right name, though I go under the name of Esther Wood and did at that time. I have been indicted for perjury, and the case is still pending.

On cross-examination, the witness testified as follows:—

The first time that I ever met Mr. Cohen was at the Oxford Hotel, May 7th. I didn't know him at all before that time. He was there from 5.15 to just before 6. It was before 6 when he left because the girls said they had an engagement to supper at 6. Mr. Cohen was there over half an hour, but not

for an hour. I didn't send for him, or request that he be sent for and am not sure who sent for him because I remained in the room. I heard Rose Heller, the girl I stayed with that night at the Oxford, talk about an attorney, but I didn't know she had sent for one. She was there when Mr. Cohen was, and I think but I am not sure, that she sent for him. I talked to him because, just before he came in, I heard one of the girls say they would call him on the 'phone, and when he came in I didn't know he was for me, but they said they would call a lawyer at the telephone, and I was lying on the bed rather sick, and he came in, and Sadie Parker talked to him first, telling him I was the girl with the two Jewish fellows taken out of the Levens Hotel. I said nothing at the time, and Mr. Cohen said he had seen them, referring to the two men who had been arrested that morning, and that they were turned over to the government, and Sadie Parker said she knew that. Mr. Cohen then turned around and said, "Why this May is married to t' 's Joe Albin". I had not known that before. He then asked was I married to Jake Gronich, and those were his first words to me. I hesitated to answer, but I told him I was married after Sadie Parker told me that he was my lawyer, and that I should tell him the truth.

I had not been arrested at that time. I was arrested that same night about 10.30 (May 7th). I retained Mr. Cohen that afternoon as my lawyer. I paid him nothing for his services. Sadie Parker told him we

were down and out; we didn't have any money, but she would go around among the Jewish people and pick up a collection, and she would pay him. I didn't know whether he was paid anything or not. He asked me once at the city jail if I had any money, and I told him No, but I told him I did get out that I would pay him. He said "That is all right; I am not worrying about that; that is all right". I told him I was married to Jake Gronich. I told him at that time I had been practising prostitution in Portland, in Baker City, Denver, Col., and Cleveland, Ohio. How I happened to tell him this was that when Sadie said that if they scared May, she would tell everything, and I told him "Yes, I worked with May in a house together in Denver, and I have worked with her back east." But he said, "Well, when you see her, then if she should tell that, then you tell that he didn't bring you here for immoral purposes, and that you did it of your own free will. If she doesn't tell it, deny you sported. That is the only way to save him because they found the receipts, the railroad tickets, right in his pockets."

I was taken that same night about 10.30. I knew they would take me as a witness for him. I wasn't charged with any crime. I was arrested by a plain clothes man. I didn't know whether he was a government official or a city official except that they took me down to the city jail. I remained in the jail all night, and remained there until May 9th, and then they took me down to the county jail. I was there 7

months in the county jail; I was held as a witness two months, and after that they indicted me for perjury. I am under indictment for perjury now, for perjury committed at this hearing before the Commissioner. They let me out of the county jail the day before Thanksgiving, 1912. The bail was \$50. of my own money. My bail was fixed at \$1000., I guess, but I didn't have anybody to go my bail, and I think some of the time there was no bail set for me. I heard it was \$1,000 when I was indicted for perjury. My bail was reduced to \$50. just the day before Thanksgiving. It happened to be reduced to \$50. because I had been in there 7 months, and I told them I would not go away, I would stay right there and not go away, and they said they would take my trunk, but they didn't take it, and that was all the money I did have. I didn't have this \$50. when first arrested. My husband sent me \$30 from the penitentiary, and I had \$15. witness fees. The witness fees were from the government. I think I got \$13 witness fees, then I put up \$20 of my own money. The government gave me the \$15. about two weeks before I got out on bail. I knew nothing of the bail being fixed at \$50. until they called me up, and it was Mr. Evans called me up, and said "Come on down, I will speak to you. Now if we leave you out on a small bail, will you run away?" And I told him I wouldn't, that I would come down and report every day. Mr. Evans was U. S. District Attorney at that time. To get the \$13. from the government I went in with Mr. McSwain for witness fees.

Mr. McSwain is one of the officials here. They gave me a paper for witness fees, about \$13 when I went out for my bail, and I believe I got some from the government. I don't remember how much they gave me, —\$13.—and I had \$35 from my husband, and \$15 they put to the bail.

The next time I had a conversation with Mr. Cohen after this talk in the Oxford, was the next morning at the city jail. That was after I was arrested. I had not testified at that time. The conversation was held at the city jail. I didn't have the postal cards introduced in evidence when I talked with Mr. Cohen at the Oxford hotel on the evening I talked with him. The postal cards were in the Levens Hotel in my trunk. I told him that I did have postal cards. He asked me if I had any telegrams or letters, and I told him No, the only thing I had was postal cards. He said, "Well, if they show you them, just say you don't remember". Mr. Cohen never saw the postal cards; the first time I saw them, after seeing them in my trunk, was when I got on the stand and they showed them to me. The conversation I had with Mr. Cohen wasn't in the cell, but out in the hall. There was nobody present but myself and Mr. Cohen; I was there with him alone. In that conversation he asked me if I had seen May, and I told him No, I didn't see anything of her, and so he said, "Well if she don't come up and tell that you worked with her in Denver you stick to your same story and deny that you ever sported." I had not tes-

tified at all at that time. The conversation lasted but a short time, about 15 minutes. I then came up here to the court and testified before Commissioner Cannon. Mr. Cohen was present when they had the preliminary hearing;—not that day but the next. Mr. Cohen told me at the jail, when I told him May wasn't there, that they must have her in the county jail, and that if I saw her, and she told that we had a house in Denver together, that I should say I was not brought here for immoral purposes; but if May did not tell, then I should deny that I had ever sported. That was on the morning I was taken down before the Commissioner, and Mr. Cohen wasn't there, and Mr. Cohen told me that if they took me down I should not speak unless he was present. They brought me up here; Mr. Cohen wasn't here, and I wouldn't talk. Mr. Cohen got up here that morning, but I had no talk with him before I continued my testimony. I talked to him at the city jail and at the court house; just as I got off the stand, he went into the hall and asked me did I talk, and I told him No, and he said Good, and then he asked could he go to Mr. Pray's office, and he told Mr. Pray in my presence that I was married to Jake Gronich, and it is a fact that I was married to Jake Gronich.

The first person that I told that Mr. Cohen had told me to deny that I was a prostitute was a lawyer I had named Miller, and then I told McGuire, the Deputy District Attorney the next day after my husband was taken to the penitentiary, and when I found

that I had been indicted for perjury. I didn't tell McGuire that until after I had been indicted, and the way I happened to tell him was that I went down there and asked him if I could plead guilty, and told him I had lied, but had been forced to do it, and he asked me by whom, and I told him I took Max Cohen's advice; Mr. Cohen forced me to lie.

Q. How did Mr. Cohen force you to lie?

A. Well, he told me up in the room, he told me to deny that I ever sported, and I didn't see May—of course when I would have seen her I would have seen if she did tell that she had sported with me, and then I would have told I sported, but I didn't see her; I didn't get no chance to see her, and they put me on the stand and asked me if I sported, and I said "no".

Q. Well, and how was it that you happened to tell Mr. Maguire that Mr. Cohen told you to do this?

A. Why, because it is the truth.

Q. I know, but what occasioned you to tell Mr. Maguire that?

A. Well, he told me that if I told him,—he told me that they were going to sentence me to Lansing—to Kansas—he told me I was to be sentenced to Lansing, Kansas, to the penitentiary, and I said "Yes, can I plead guilty right away", and he said, "You have to wait for the Grand Jury", and I told him, I said, "Yes, I will plead guilty, but", I said, "I was forced to do so", and he asked me then and I told him that I took Max Cohen's advice.

They never brought me on to plead guilty, saying

I would have to wait for the grand jury, and I have never pleaded guilty. I told them and admitted that I was guilty of lying, but that I was forced to do so. I don't remember for sure when I was indicted by the grand jury, but I think it was right after my husband was sentenced to the penitentiary, or it was before.

Q. Why has not your case been brought on for trial?

A. Why, I was to wait for the grand jury, I think?

Q. Well, I know, but the grand jury indicted you some several months ago. Now, why hasn't your case been brought on for trial?

A. It is on trial now, isn't it? It is on trial now. This is the trial now.

Q. You imagine this is your trial here?

A. I don't know.

I don't remember the district attorney saying anything to me about the trial of my case; they subpoenaed me two weeks ago. I had a talk with them when I got out on bonds, and they told me I wasn't to go away from Portland, and that I was under bonds, and they told me I was under bonds for Max Cohen's trial. I guess he was up for perjury too. They didn't tell me when my case was to be brought on for trial. I don't know whether I have had any understanding with the government about my case. I am held as a witness now. I agreed to plead guilty before I was indicted. I had no understanding with them in regard to pleading guilty after I was indicted. Mr. Pray and Mr. Maguire came and talked to me

about my swearing falsely; they all told me that I was, after I got off the stand, and they had conversations with me in the court house several times. I first told them about Mr. Cohen giving me advice when they sentenced my husband, which was two months after I had testified. The way I happened to tell them that was that I saw in the paper that I was up for lying, for perjury, and I went down and asked if I could plead guilty, and told them I had lied and was forced to do so by my lawyer, Max Cohen. The government has not promised me anything in regard to my case, and I have no understanding with them. I don't know whether I will be prosecuted for perjury. I lied, but I was forced to do so. I have been indicted for perjury and have offered to plead guilty before I was indicted, but I have not pleaded guilty and I am out on \$50 bail. I was indicted for perjury, and they told me they would dismiss it on my own recognizance, but that I wasn't to go away. I am quite sure they used the word dismiss. The man who came down and said I would be let out on my own recognisance was Mr. Duke from the marshal's office. When I talked with Mr. Evans, and told him in answer to his question, that I wouldn't run away, he said he would try to put my bond as low as he could, and asked me if I could put up \$50. I told him Yes, that was all I had. I don't quite remember what Mr. Evans said about dismissing. I didn't have any talk with Mr. Maguire or Mr. Mowry when I went out. I just spoke to Mr. Mowry about my case Saturday, and

never saw him before then. I didn't talk with anybody else nor with Mr. Maguire. The only time I have talked with Mr. Maguire since I have been in jail was when I went down to plead guilty, and told him about Mr. Cohen telling me to deny that I had ever sported. I don't remember talking to anybody after Mr. Maguire. I talked to Mr. Pray once afterwards, but not the same day. I have talked to Mr. Pray a great many times. He was at the jail quite a few times, but not exactly to see me, and I spoke to him then. Mr. Pray didn't advise me to testify against Mr. Cohen, and nobody else said anything to me about it. "I said that when I was going to plead guilty that I was going to say that I wasn't the cause of it because I was forced to do so." I didn't know whether I expect to be sent to the penitentiary, but I know I am not afraid. I have no promise from the government. I don't know whether I will be sent to the penitentiary.

Mr. Cohen was not acting as Mr. Gronich's attorney, but when he came to the hotel he seemed to know quite a bit about it because he told me that May was married to Albin, and I hadn't known that. I did just as Mr. Cohen advised me. Gronich was my husband, and of course I know I was sporting and all, and he had the tickets right on him. I didn't think there would be any chance to save him, and he told me that would be the only way I could save him. I wasn't indicted for any offense at that time. I did as Mr. Cohen advised me to do. I thought if that would save

my husband, I would do so. I didn't know anything about the law, and had never been to school in my life, and he told me that was the only way to save him, and I took his advice.

On re-direct examination, Esther Wood testified as follows:—

I didn't know whether my trunk at the Levens Hotel had been seized by the officers when I was talking to Mr. Cohen at the Oxford. I was married in Cleveland, Ohio, in the court house, by the squire, on December 10, 1910. I have been his wife ever since that marriage, and have never been divorced.

On re-cross-examination, the witness, Esther Wood, testified as follows:—

I was convicted once in the police court of prostitution and pleaded guilty. They had me up for vagrancy. I have been sporting ever since they turned me out of jail. I pleaded guilty. That was since they let me loose from jail up here. They arrest all prostitutes as vagrants. I am now living in a house of ill fame. I first I reported to the government pretty often, and I think they know I am down in a house of prostitution.

ROSE HELLER, a witness called on behalf of the government, testified in substance, so far as material to this exception, as follows:—

I am acquainted with a girl named Esther Wood. I have been sitting here in the court room, and saw her on the stand. I first met her at Baker City in

about that. She told Mr. Cohen herself she was married; Mr. Cohen didn't ask her. Mr. Cohen didn't ask her whether she had been sporting. I didn't hear anything about Denver, but just those two towns, Baker and Astoria, that is all. After she told him that, Mr. Cohen said, "You don't have to say that; they won't find that out". He told her not to say that she had been sporting. I can't remember his exact language. The only words that I remember are that she said she was sporting in Baker and Astoria, and here one day for Sadie Parker. Those few words I remember, and Cohen said, "You don't have to say you sported", he said, "they won't find you out." At that time Esther had not been arrested, and nobody knew that she would have to testify any place. Esther knew that she was going to be arrested because she heard that Greenwich was,—that the government had got in, so she knew there was no chance for her to run away. I do not remember hearing Esther Wood in that conversation say anything about anything else.

Q. And when Mr. Cohen told her that she should testify that she wasn't a prostitute, he said this openly, did he, in the presence of all of you?

A. Yes, sir.

Q. That is, he advised her to commit perjury, openly in the presence of everybody right around?

A. Yes.

I haven't done anything for a whole year, nearly; I have been sick. I had been living at the Oxford, but I have now moved to the Levens, and I have not

been sporting for over a year. I have money of my own. I never gave any written statement of this case. When I talked to Mr. Mowry Saturday they brought out a written statement of what I had said when I was brought up here last September, and they read it to me. I wasn't there when Esther Wood talked; I came half an hour later? I never asked Esther Wood what was going to become of her case.

VIOLET WOODS, a witness called on behalf of the government, testified in substance, so far as material to this exception, as follows:—

I live at the Levens Hotel, and my occupation is a sporting girl. I am acquainted with the defendant, Max G. Cohen. I have seen him once, that was the day after Gronich's arrest, either May 6 or 7, 1912. I was in Rose Heller's room before he came in, Rose Heller, Esther Wood and Sadie Parker were also there. It was some time after 5 o'clock before he arrived. I think he stayed about half an hour. I don't know whether Sadie Parker or Rose Heller called for him. Esther Wood was on the bed crying, and Mr. Cohen said "What does this mean, and what is this about?" Sadie Parker says, "She is the girl of the two fellows that were taken last night." Mr. Cohen said "Yes, I just came, I was up there and saw them turned over to the marshal", and he said, "They have a colored lawyer". Sadie Parker asked if he could do anything. He asked Esther if she was married, and Esther hesitated, and she didn't want to say anything, and Sadie Parker said, "Esther, you can tell

Max because he is your lawyer, and he can see what he can do for you", and Esther didn't want to tell him anything at first, and finally we told her, all of us, "Go ahead, tell Max Cohen; maybe he can do something for you". Esther started to tell about her case, and she said, "We came up here with this May and this Joe", and he said, "Yes, I know, I have heard May was married to him", and Esther spoke up and said, "Is that so?" She was kind of surprised, and he said, "Yes, I think she said she was married", and so Sadie Parker handed Esther \$3.00, and she said I would give her \$5., and we would see if we could not get her away from here. Mr. Cohen said that would not do; "It is no use for her to go away", as we asked him if that would not be best. He said, "No, I wouldn't advise her to go away; if she goes away she might just as well give herself up to the government, go up and give herself up." He said, "She has no chance to get away", and Esther had told him the different places where she had been, and she told him where she had sported one day here. She said about these different places, "What will they do if they find out?" and Mr. Cohen said, "Well, have you sported since you have been back?" She said, "Yes, I have sported one day on 3rd street since I have been back". Sadie Parker then said, "She worked for me last year about Christmas day, something like that", and he said, "They won't find that out; you can say you were rooming there", and Sadie Parker said, "She has been at Astoria", and Esther Wood spoke up and told Mr.

Cohen that when she was on her way out here she had a house with May in Denver, and she said she was here last year in Baker City, and sported in Astoria and Portland since she came back, and he said, "They will have to prove you have been sporting; I don't think they can find out." And Esther Wood said, "What will I do if they do find out?" He said, "Well, if they do find out, May has told you have (been sporting), just find out she has told. They might scare you and tell you, but find out for yourself. Then you can say you did it of your own accord, but your husband didn't know anything about it, and if she tells you have been sporting, say that Jake didn't know anything about it", that she had done it of her own free will, and if May didn't tell, Mr. Cohen told her to deny that she had ever been sporting.

Mr. Cohen asked her if she had any letters or telegrams in her trunk, and she said she didn't know whether she had any letters or telegrams or not, but thought she had some postals that Jake sent her, and that they were in Jake's handwriting, and Mr. Cohen said, "Well, if they show you those postals, you can say you don't remember anything about them; you don't remember them."

On cross-examination Violet Woods, so far as material to this exception, testified as follows:—

There were 5 of us in the room including Mr. Cohen, and all the conversation was held openly in the presence of everybody. Mr. Cohen asked Esther first how long she had been back, and she said just a few

days, and he asked her had she been sporting since she came back, and Esther didn't want to say anything. After that Esther started to tell him that she came out here with May and Joe Albin. I told Mr. Cohen I was down in Astoria, and Esther was sporting there, and Mr. Cohen said, "Well, they can't find that out; they will have to prove it". And Esther asked what she should do if May told that they had had a house in Denver, and Mr. Cohen said that she should find out first that May had told, and if May had told, that she could say that she did it without her husband's knowing it and of her own free will; and that if May didn't tell, she could deny she had been sporting. He told her twice she could deny it. At that time Esther Wood had not been arrested and nobody had seen her.

I talked to Lawyer Miller and Mr. Maguire and Mr. Evans after Esther was arrested for perjury. She was in jail, but was supposed to get out the next day after Gronich was sentenced. Esther didn't tell me she was going to plead guilty; I didn't know anything about that when I went up to the jail to see her. She told me she was held as a witness against Max Cohen. That was on the second day after Jake Gronich's sentence.

I am a prostitute and live at the Levens Hotel.

To further illustrate this exception, a copy of Government's Exhibit 3 is annexed to this bill of exceptions, made a part hereof, and marked Exhibit A.

Also Exhibit I introduced by the government, is referred to to illustrate this exception, and is as follows:—

UNITED STATES OF AMERICA,

District of Oregon.—ss.

Complaint for violation of White Slave Traffic Act.

THE UNITED STATES

vs.

JAKE GRONICH.

Before me, the undersigned, a United States Commissioner for the District of Oregon, personally appeared this day Charles P. Pray, who, on oath, deposes and says that the said Jake Gronich, on or about the 8th day of April, 1912, at Cleveland in the state and district of Ohio, did unlawfully, knowingly and feloniously procure and obtain a ticket and tickets, and form of transportation and evidence of right thereto to be used in interstate commerce by a woman, to-wit: Esther Wood in going from the said Cleveland, in the State of Ohio, to Denver in the State of Colorado, and from the said Denver in the State of Colorado to Portland in the State and District of Oregon and within the jurisdiction of this court, for the purpose of prostitution and debauchery and for an immoral purpose, to-wit: that she, the said Esther Wood should live with him, the said Jake Gronich, as his concubine, whereby the said woman, to-wit: Esther Wood was transported in interstate commerce from Cleveland in the State of Ohio to the City of Denver in the State of Colorado and from the said

Denver in the State of Colorado to Portland, in the State and District of Oregon, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And furthermore the said deponent says he has reason to believe and does believe that Esther Wood and May Swindle alias May Weller are material witnesses to the subject matter of this complaint.

CHARLES P. PRAY.

Subscribed and sworn to before me this 7th day of May, 1912.

A. M. CANNON,
United States Commissioner.

It is hereby certified that the foregoing evidence and the other evidence contained in this Bill, and the exhibits hereinbefore and hereinafter set forth contain all of the evidence material to the matter to which this exception relates.

II.

An exception was duly taken and allowed to the introduction of the complaint against Jacob Gronich, which said complaint is Government's Exhibit 1, and is copied in full in the preceding exception, and which said complaint is hereby referred to and made a part of this exception; the grounds for this exception being that said complaint is immaterial, for the reason that the indictment sets forth that on the 9th day of May, 1912, there came on to be tried before the Hon-

orable Anderson M. Cannon, United States Commissioner for the District of Oregon, a certain issue in due manner joined between the United States of America and Jake Gronich upon a certain charge and complaint then and there pending before the said United States Commissioner against him, the said Jake Gronich, for a violation of the White Slave Traffic Act, which said complaint so referred to in said indictment, is the complaint copied in full in the preceding exception, and referred to as Government's Exhibit 1.

To further illustrate this exception, the indictment in the above-entitled cause is hereby referred to and made a part of this exception.

It is hereby certified that the foregoing evidence and the other evidence contained in this bill, and the exhibits hereinbefore and hereinafter set forth, contain all of the evidence material to the matter to which this exception relates.

III.

An exception was duly taken and allowed to the introduction of evidence of the fact that Esther Wood practised Prostitution at Baker City, Denver, Colorado, or anywhere else within the United States, on the ground that such evidence was incompetent, irrelevant and immaterial.

To Illustrate this exception, Anderson M. Cannon, a witness called by the government, so far as material to this exception, testified in substance as follows, with reference to statements made by Esther

Wood at the preliminary hearing conducted by him under the complaint against Jacob Gronich, incorporated in the first exception herein, and which complaint is designated as Government Exhibit 1, and is hereby especially referred to and made a part of this exception:

A. M. CANNON

I am United States Commissioner for Oregon, also Clerk of the United States Court here. I remember the complaint filed against Jacob Gronich. Esther Wood testified as a witness May 9, 1912. This oath was administered by myself, and her testimony was reduced to writing.

Esther Wood testified that she did not practice prostitution in Baker City, nor in Denver, Colorado, nor at any other place or at any other time. All of the testimony of the said Esther Wood was given by her under oath. The oath was the usual one and was as follows:—‘You do solemnly swear the testimony you are about to give in the case now pending wherein the United States is plaintiff and Jake Gronich is defendant will be the truth, the whole truth and nothing but the truth, so help you God’.

On cross-examination, the said A. M. Cannon testified in substance, so far as relevant to this exception, as follows:—

Esther Wood was not a defendant in the hearing before me held on the 9th of May, 1912. She was a witness subpoenaed by the government.

As a part of its case in chief, the Government offered testimony to the effect that all of the evidence contained in Government's Exhibit 3, hereto attached, was given by the witness Esther Wood under oath before said United States Commissioner Anderson M. Cannon at the said preliminary hearing of the said defendant Jake Gronich.

ESTHER WOOD, a witness called on behalf of the government, so far as material to this exception, testified in substance as follows:—

I lived in Baker City, Denver, Colorado, Cleveland, Ohio, Astoria, Oregon, and Portland, Oregon, and I have practiced prostitution in all these different places. At the preliminary hearing under the complaint against Jake Gronich before U. S. Commissioner Cannon, I was asked whether I had ever practised prostitution at Baker, or Denver, or Portland, or any other place in the United States, and I answered No, whereas as a matter of fact, I had practised prostitution in the said places. I gave such testimony falsely because the defendant, Max G. Cohen, had advised me so to do.

It also appeared from the testimony that Esther Wood had been married to Jacob Gronich at Cleveland, Ohio, December 10, 1910, and that at the date of the trial of the above-entitled cause, the said Jacob Gronich and Esther Wood were still husband and wife, and had never been divorced.

To further illustrate this exception, the indictment in the above-entitled cause is hereby referred to and made a part hereof.

To further illustrate this exception, Governments Exhibit 3 in which is contained all of the evidence given at the preliminary hearing before Commissioner Cannon which was introduced in evidence in the above-entitled cause, is hereby referred to and made a part hereof, and a copy is hereto attached, in connection with the first exception here in, marked Exhibit A.

It is hereby certified that the foregoing evidence and the other evidence contained in this bill, and the exhibits hereinbefore and hereinafter set forth, contain all of the evidence material to the matter to which this exception relates.

IV.

An exception was duly taken and allowed, on the grounds of incompetency, immateriality and irrelevancy, to the introduction of certain postal cards, marked Government's Exhibits 4, 5 and 6, which said exhibits are hereby referred to and made a part hereof, and copies of which are hereto attached marked Exhibits B, C and D; and an exception was also taken and allowed to the introduction of any testimony with reference to said cards. The introduction of said exhibits, and testimony with reference thereto, was allowed by the court for the purpose of showing the relationship between Jacob Gronich and Esther Wood.

FRANK L. BUCK, a witness called on behalf of the government, testified in substance, so far as pertinent to this exception, as follows:—

A number of postal cards were exhibited to Esther Wood at the preliminary hearing before United States Commissioner Cannon on May 9, 1912, and questions were asked her about them, and Esther Wood denied that the postal cards were hers or that she had ever seen them before, except as to one postal card which she said she saw at Canton, Ohio, but did not know the handwriting, and that she had seen another postal card at another place, but did not remember where it was from; and when pressed as to her knowledge of said postal cards, refused to answer. Asked again as to the handwriting on one of the postal cards, Esther Wood testified that she didn't remember and that it was not in her handwriting, and that she didn't remember whether she had ever seen the card before; and as to another postal card, that she did remember seeing it.

ESTHER WOOD, a witness for the government, in so far as pertinent to this exception, testified in substance, as follows:—

At the preliminary hearing before U. S. Commissioner Cannon they exhibited to me the card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colorado, I don't remember just when. Another card, (Gov. Ex. 5), was exhibited to me at the preliminary hearing.

Jake Gronich sent this card to me and I got it in Portland. At the preliminary examination before U. S. Commissioner Cannon, they asked me if I had ever seen this card, and I remember saying once No, and again that I didn't remember. At the time I so testified I did remember seeing the card before, and knew that I was swearing falsely, but so testified because my lawyer advised me to. As to Gov. Ex. 6, at the preliminary hearing before U. S. Commissioner Cannon, they asked me if Jake Green sent me this postal, and asked me if I knew any fellow named Jake Green, and I said No, and they asked me if he sent it to me, and I said once No, and again that I didn't remember. At the time I did remember. A card was exhibited to me which was in my own handwriting, and they asked me if it was my writing, and I said No, and they asked me again, and I said I didn't remember, and they asked me had I ever seen the card before, and I told them that I didn't remember, and at time I so testified I knew I had seen it before, and I did remember, and I so testified because my attorney advised me to.

When I talked with my lawyer Max Cohen at Room 3, in the Oxford Hotel on May 7th, I told him I had some postal cards in my trunk from different places where I had sported. He said, "When they show you, just say that you don't remember".

On cross-examination the witness testified, in substance, as follows:—

At the time I had the conversation with Mr. Cohen

at the Oxford Hotel, he didn't see these post cards, and I didn't have them at the hotel; they were in my trunk at the Levens Hotel. The first time I saw them, after seeing them in my trunk, was when I got on the stand and they showed them to me.

It also appeared from the testimony that Esther Wood had been married to Jacob Gronich at Cleveland, Ohio, December 10, 1910, and that at the date of the trial of the above-entitled cause, the said Jake Gronich and Esther Wood were still husband and wife, and had never been divorced.

An to further illustrate this exception, Government's Exhibit 3, filed with the first exception herein as Exhibit A, is hereby specially referred to and made a part of this exception.

It is hereby certified that the foregoing evidence, and the other evidence contained in this bill, and the exhibits hereinbefore and hereinafter set forth, contain all of the evidence material to the matter to which this exception relates.

V.

An exception was duly taken and allowed to the following part of the charge of the Honorable Court to the jury in the above-entitled cause:—

Now, it appears, or there is evidence tending to show that Esther Wood was the wife of Gronich at the time of his arrest, and had been for some time prior thereto. That would not excuse him from a violation of the white slave traffic act. No man has

a right to transport his own wife from one state to another for the purpose of prostitution, so the fact that she was his wife would be wholly immaterial upon that inquiry or upon this.

Among other instructions given by the Court to the jury was the following:—

Now, something has been said about the manner in which Miss Wood was treated before the Commissioner. Now, I do not think that is very material in this case. If she was sworn and testified as a witness in that case and knowingly and wilfully testified falsely, she committed perjury and that is about all that is necessary to be said about that matter. It is one of the facts in the case and you have a right to weigh it along with all the other testimony in the case; but however badly she may have been treated or however wrongly she may have been treated would be no justification or excuse on behalf of this defendant if, as a matter of fact, she committed perjury at his request or his instigation.

The testimony of Esther Wood, a witness for the Government, was uncontradicted at the trial that she was the wife of Jake Gronich, the defendant at the preliminary hearing before Commissioner Cannon on May 9, 1912, and held under the complaint, set forth in full under Exception 1, and hereby referred to and made a part hereof; and said relation of husband and wife between Jacob Gronich and Esther Wood existed at the time of said preliminary hearing before United States Commissioner Cannon, at which hear-

ing appeared the testimony of the said Esther Wood with reference to her prostitution and with reference to the postal cards, which testimony is charged in the indictment herein as being perjured, and as having been suborned by the defendant herein; and that the said Esther Wood was required to testify at the said preliminary hearing against her husband, Jake Gronich, over her objections and under threats of punishment for contempt of court in case she refused to testify.

To further illustrate this exception, Government's Exhibit 3, which is hereby annexed and already marked Exhibit A under the first exception herein, is hereby specially referred to and made a part of this exception.

EDWARD L. NORRIS, a witness called on behalf of the government, testified as follows:—

I live in Denver, Colorado. My occupation is that of a patrolman; I have been a member of the Denver police force for six years; I have been in the courtroom during this trial and have heard the testimony of Esther Wood; I know Esther Wood and I saw her in Denver on or about February 15, 1912, at which time she was a prostitute and was carrying on her said trade at a crib on Morgan street. A girl by the name of May Swindle was with her at that time.

E. M. HOUGHTON, a witness on behalf of the government, testified as follows:—

I am the captain of police at Astoria, Oregon, and have been there for two years. I have heard the tes-

timony of Esther Wood given at this trial. I have seen this woman before in Astoria in the year 1911, at which time she was carrying on her trade of prostitute in a crib; she was there for about two or three months in a house of prostitution.

A. L. LONG, a witness on behalf of the government, testified as follows:—

I am a police officer of the city of Portland and have been such for two years; I remember when Jake Gronich and Joe Albin was arrested. I made the arrest. The defendant Max G. Cohen was in town at that time. I saw the defendant on May 9th and had a talk with him at the police station about Esther Wood and her refusal to testify, and the defendant said to me at that time: "You didn't act much out of that girl yesterday, did you?" I said "No, not much", and he said "You don't get much out of my clients unless you get ahold of them before I do". He said to me, "If you get anything out of my clients, you have to get ahold of them before I do."

It is hereby certified that the foregoing exhibits and evidence contained in this bill of exceptions contain all of the evidence material to the matter to which this exception relates.

UNITED STATES OF AMERICA,

District of Oregon,—ss.

The foregoing Amended Bill of Exceptions contains all the proofs made and evidence adduced and proceedings had, affecting the matters to which ex-

ceptions relate, before me, R. S. Bean, Judge of the District Court of the United States for the District of Oregon; and now, that the foregoing matters may be made a part of the record, the undersigned, Judge of the District Court of the United States for the District of Oregon, doth hereby allow, settle and sign, within the time allowed by the law, and the extension thereof granted by the undersigned, and in conformity with the order of this court, this foregoing Amended Bill of Exceptions, and orders the same to be filed.

Dated the 3rd day of September, 1913.

R. S. BEAN,
Judge of the District Court of the
United States, for the
District of Oregon.

GOVERNMENT EXHIBIT 3

Statement of Esther Wood.

Questions by Mr. MAGUIRE.

Q. Your name is what?

A. Esther Wood.

Q. How old are you?

A. 24.

Q. What has been your place of residence?

A. I refuse to talk any further.

Q. On what ground?

A. Until I see my lawyer.

Mr. MAGUIRE: She has already consulted with him once.

Mr. CANNON: You might question her and find

out why she does not want to testify.

Miss WOOD: I will not speak to you until I see him.

Q. On what ground? Why don't you want to testify? Why don't you want to talk? Have you any reason for not testifying? You understand, Miss Wood, do you not, that this a judicial inquiry and you are now in the presence of a commissioner who has authority under the law to administer oaths and examine witnesses, so that you have been called to the stand and must give some reason for not testifying, other than the fact that you want to talk to your attorney. Did your attorney advise you not to testify?

A. No, sir.

Q. Have you talked with your attorney?

A. Yes, not very long.

Mr. MAGUIRE: If the court please, the witness has talked with her attorney on two different occasions; once in Mr. Pray's office and once in the city jail.

Mr. CANNON: You understand you can be punished for your attitude?

A. Yes, sir.

Q. Do you prefer to be punished and kept in jail rather than testify?

A. Yes, sir.

Q. Very well, then, Miss Wood, this is probably what will happen to you unless you do testify. You will probably have to go to jail for an indefinite time, if you prefer to do that rather than answer simple

questions.

Mr. STEPHENSON: If you please, Commissioner—

....Mr. MAGUIRE: If the court please, I prefer to pursue this inquiry direct and then let counsel do his questioning. If the witness has any privilege she wants to claim, let her claim it herself.

Mr. STEPHENSON: I think under the Federal authorities, the witness is not compelled to testify either for or against this defendant.

Mr. MAGUIRE: Until that develops. If she refuses to testify I can't develop anything.

Q. What is your name?

A. I refuse to talk. I have told you once.

Q. How old are you? Do you refuse to answer that? Where have you lived in the last two years? Do you refuse to answer that question also?

A. Yes, sir.

Q. On what ground?

Mr. CANNON: I don't think there is any use pursuing this hearing any further. I think I will—

Mr. STEPHENSON: I would like permission, if your honor please, to ask the witness one question.

Mr. MAGUIRE: If the court please, I object to that. The Government, I think, has subpoenaed this witness, and as she has refused to testify, there is no chance for any cross-examination.

Mr. CANNON: I presume that is technically correct, although I don't care to put an incompetent witness in jail, if she is, as a matter of fact incompetent.

Mr. STEPHENSON: I will ask her, if your honor please—

Mr. MAGUIRE: If the Court please, I object. I am perfectly willing to ask the questions of my witness.

Q. I will ask you again, what is your name?

A. I have told you once.

Q. Your age is 24 years, is that correct?

A. Yes, sir.

Q. Where have you lived in the last two or three years?

A. I refuse to answer any further.

Mr. CANNON: That does not have anything to do with this case.

A. I refuse to answer.

Q. Upon what ground? Why do you refuse to answer? It has nothing to do with this defendant or with this case in any way. As far as I can see, it is purely preliminary. If they ask you a question that you think will compromise you in any way, you may stop. This is a very simple question and I think you ought to answer it, unless you have simply made up your mind to be stubborn.

A. I will answer all the questions as soon as I have seen my attorney. I haven't talked to him. I was very ill. I didn't talk to him.

Mr. MAGUIRE: Her attorney has been notified of the time of the hearing and he has already told Mr. Pray and myself over the telephone that he had advised her to tell the truth about the matter, so there

is no excuse for her attitude.

Mr. CANNON: If she is incompetent, there is no use for me to commit her.

Mr. MAGUIRE: She is not incompetent. I believe counsel's position is this; that she is incompetent to testify against this defendant because there may be a marriage relation claimed between them. (Cases cited, etc.)

Mr. CANNON: I understand that is the rule.

Mr. STEPHENSON: If your honor will allow me to ask the witness a question. Miss Wood, I ask you whether it is a fact or not that you are married to the defendant, Gronich?

A. I will let you know later on.

Mr. CANNON: I will do this. I will take this case under advisement, and this witness will be committed to the county jail pending a decision in the matter, and I don't know just when I will be able to decide it, and her bond will be fixed at \$2,500.

Mr. STEPHENSON: Now your honor has fixed the bail in the case of United States v. Albin at \$4000; that was temporary.

Mr. CANNON: I fixed his bail yesterday morning at \$4000.

Mr. STEPHENSON: Can your honor reduce this bail at this time?

Mr. Cannon: I cannot do it now.

Mr. STEPHENSON: You have not committed this defendant?

Mr. CANNON: No, I have not.

Mr. STEPHENSON: Do I understand the government concludes offering evidence at this time?

Mr. MAGUIRE: No, the case is continued.

Mr. CANNON: Do I understand this is all the testimony you have?

Mr. MAGUIRE: There will be testimony coming from Denver.

Mr. STEPHENSON: If the government intends to conclude at this time, I would like to ask of the Government the reason why he feels this defendant ought to be held to the Grand Jury.

Mr. MAGUIRE: I have not held; I merely took the case under advisement at this time.

Mr. MAGUIRE: I think, if the court please, that I will ask for a continuance of this case pending some decision one way or the other as to her being in contempt, and it may be quite likely she will change her mind when she understands more fully.

Mr. CANNON: I think she will. I will continue the case and you can call it up at any time you see fit.

Mr. COHEN: If the court please, I represent this witness in this case. I don't know what position the government here decides to take in this matter in reference to this witness at all. She has certain rights and must be protected, and I don't intend to let those rights be violated in any way. If the Government desires anything that is pertinent to any issue, I would like to know it and if satisfactory and it does not affect the rights of the witness here, I have no objections. Do I understand, Mr. Cannon, you have

given her general advice in answering questions on the stand regarding anything that might incriminate her in any way, shape, manner or form?

Mr. CANNON: Yes.

Mr. MAGUIRE: Do I understand you want to reopen this case?

Mr. COHEN: I say that openly. I don't take it up with any threats with any contempt proceedings. That is not the contention I make, I am doing it for friends.

Mr. MAGUIRE: I just wondered whether you had given your client advice not to answer questions.

Mr. COHEN: Certainly, against the ruling of the court.

Mr. MAGUIRE:

Q. Where have you been—where has been your place of residence your address in the last three years?

A. Cleveland, Ohio, for the last three years. Not all the time I have been there.

Q. When did you leave Cleveland?

A. I left Cleveland—I don't remember the date.

Q. About how long ago.

A. About five weeks ago.

Q. How long had you been in Cleveland before then?

A. I had been there off and on for the last 5 or 6 years.

Q. Had you ever been out on this coast before?

A. Yes, sir, once before.

Q. Where had you been out here?

A. Why, I have been—

Mr. COHEN: Now, I object—

Mr. MAGUIRE: Now, if the Court please, counsel is not in this case at all. He is not representing this defendant, and he has no place here at all. Counsel's interference is resented and I shall ask the Court for a ruling.

Mr. CANNON: Counsel cannot claim the privilege for her.

Mr. COHEN: I don't understand what position the government is going to take in this matter at all. I simply ask for her privilege. She does not understand it and asks to be represented by counsel. She has a right to advice, I suppose? Has she asked that of the court?

Mr. CANNON: I have advised her that whenever she feels that she is incriminating herself she need not answer.

Mr. COHEN: I want the record to show whether this witness has asked whether she be entitled to counsel.

Mr. MAGUIRE: I object to counsel's statements. He is not in this case at all one way or the other. He is nothing more than a bystander and is interfering with the prosecution of justice. Now, if you will answer my questions, Miss Wood. Do you remember the question?

A. No, sir.

Q. How long were you in Oregon and where did you stay?

A. I have been here—I will tell you the dates in a minute. I have been here about two weeks.

Q. Have you ever been here before?

A. No, sir, not in Portland.

Q. Where at in Oregon?

A. I refuse to answer that question.

Q. On what ground do you refuse to answer that question?

A. I have not been out in this state before, not lately.

Q. How long ago was it you were out here?

A. I do not remember.

Q. 1, 2 or 3 years ago—how long?

Mr. CANNON: Well, go ahead.

Mr. MAGUIRE: Please answer the question, Miss Wood.

A. I don't know—last summer.

Q. Where did you live?

A. At Baker City, Oregon.

Q. Did you ever live here any place in the state?

A. No, sir.

Q. Were you ever in Portland before this last trip?

A. No, sir.

Q. Have you ever been at the Levens Hotel here in Portland before this particular trip?

A. No, sir.

Q. Have you ever been in Portland before?

A. I went by—I didn't stop here.

Q. You know the defendant in this case?

A. No, sir, I do not.

Q. I mean Jacob Gronich.

A. Yes, sir.

Q. How long have you known him?

A. I have known him as long as I have been married to him.

Q. Did you ever know him before?

A. Yes, sir, not very long.

Q. Where did you meet him?

A. Cleveland, Ohio.

Q. Were you ever in Astoria, Oregon?

A. No, sir.

Q. Were you ever in Astoria, Oregon, during the years 1910 and 1911?

A. No, sir.

Q. When in Baker, where did you live—what was your address?

A. 1797 Auburn Ave.

Q. On what is known as "The Nile" there, isn't it?

A. I don't know.

Q. Did you ever hear of the Nile in Baker, Oregon?

A. No, sir.

Q. Did you practice prostitution in Baker, Oregon?

A. No, sir.

Q. At no time?

A. No, sir.

Q. Have you ever practiced prostitution any place

in the United States?

A. No, sir.

Q. Did you ever rustle?

A. No, sir.

Q. Were you ever in Denver, Colorado?

A. Yes, sir.

Q. When were you there?

A. 2 weeks ago.

Q. Were you there in January of 1912?

A. No, sir.

Q. You weren't in Denver in January of 1912?

A. No, sir.

Q. Did you ever hear of 2030 Market street, Denver?

A. No, sir.

Q. I will ask you if you ever saw this postal card before?

A. No, sir, it is not mine.

Q. Did you ever see it before?

A. No, sir.

Q. I will ask you if you ever saw this postal card before?

A. Yes, sir.

Q. Where did you see it?

A. I think it was Canton, Ohio.

Q. Whose handwriting is that?

A. I don't know.

Q. You don't recognize that as being the handwriting of anyone you ever knew?

A. No, sir.

Q. Did you ever see this postal card on any other occasion or in any other place?

A. Yes, I have seen it, but I don't remember where that is from.

Q. Don't you remember who sent it to you? Where did you get hold of it?

A. Why—

Q. What were you going to say?

Mr. MAGUIRE: I wish the court would advise this witness to speak up.

Mr. CANNON: Please answer, Miss Wood and say whether you ever got it. You know whether it is your or not, don't you? Is that yours? Is that your postal card? Was it sent to you?

A. I refuse to answer.

Q. On what ground?

A. I don't remember.

Mr. MAGUIRE: Isn't it a fact you got that in Denver?

A. I don't remember.

Q. Did you get any mail in Denver?

A. Not since I have been there. Since 2 weeks ago.

Q. You did not get any mail in Denver in January, 1912? Answer that please.

A. I don't remember.

Q. Where were you in January, 1912, more particularly on the 29th day of January, 1912, up to the 10th of February, 1912.

A. I do not remember.

Q. You don't know where you were?

A. I don't remember.

Q. Where did you leave a month ago during April, 1912?

A. In Cleveland, Ohio.

Q. When did you leave Cleveland?

A. I left there; it is about 4 or 5 weeks ago. I don't just remember the date.

Q. And whom did you leave there with?

A. With my husband.

Q. Who is your husband?

A. Jake Gronich.

Q. What is his name?

A. Jake Kramer.

Q. At first didn't you say Green?

A. No, sir, I said Kramer.

Q. I think you said Green.

A. No, sir, I said Kramer. I didn't know anybody by the name of Green.

Q. Do I understand you to say that you don't know anybody by the name of Green? Who is the man you sent that card?

A. I don't remember.

Q. You don't know who it was?

A. No, sir.

Q. You don't know any man by the name of Jake Green? Is the defendant here Jake Gronich, or Kramer, or does he go under the name of Green?

A. No, sir.

Q. Did you ever hear that name at all?

A. No, sir.

Q. Whose handwriting is on this postal card?

A. I don't know. I don't remember.

Q. Look at it. Isn't that your handwriting?

A. No, sir.

Q. Write Esther Wood. Write Jake Green. Now write these words, "That is no lie". Didn't you write that?

A. No, sir.

Q. Look at it again and see if it doesn't look just exactly as you have written it there.

A. Lots of people write the same.

Q. You would swear that you didn't write that?

A. Yes, sir.

Q. You are sure of that?

A. I don't remember the postal.

Q. Whose handwriting is that? Do you swear you didn't write that at all?

A. I don't remember. It hasn't been mailed to me. I don't remember.

Q. Who wrote on this card which is entitled "A little bit of fancy work"?

A. I don't know.

Q. Is that your handwriting?

A. I don't remember.

Q. Does it look like yours?

A. I don't know.

Q. Does it look like yours?

A. I don't remember.

Q. I didn't ask you that. I asked you whether

this handwriting looked like your handwriting. Do you know whether you wrote this or not?

A. No, sir, I don't remember.

Q. Did you ever see that postal card before?

A. I don't remember.

Q. Do you remember seeing that card before?

A. I remember seeing it.

Mr. MAGUIRE: I wish the Court would advise her regarding false swearing.

Mr. CANNON: You must understand that already you are under oath here, and being under oath, you are expected to tell the truth; when you do say anything, tell the truth about it, and if you don't you subject yourself to penalties for perjury and false swearing.

Mr. COHEN: I want to interject, if I may with the Court's permission, that I wish counsel would explain to this woman. She is extremely nervous and suffered last night with hysteria and has had Dr. Ziegler taking care of her. In fact, Mrs. Simmons, the matron of the jail, telephoned to the United States marshal to send a government physician down there. This woman perhaps don't realize what she is saying. I talked with her ten minutes, and she didn't remember what she had said to me, and I think the matter should be used with some discretion. If they are asking this witness for evidence of a certain crime, they should confine it to that certain crime.

Mr. CANNON: She was put on the stand this morning, and said she did not want to testify until

she had talked with her attorney. The case was put over twenty-four hours. If she wants to talk she can talk now. I don't see any way to stop the government—to stop this case now. As a matter of fact she is not entitled to counsel at this time. There is nothing there that entitles her to counsel. She is not charged with any crime. You may proceed with the examination. I got all of this I want.

Mr. MAGUIRE:

Q. Did you ever see this card, and if so, where? Where did you receive it?

A. I don't remember.

Q. Well, you remember seeing this card before, don't you?

A. I don't remember.

Q. You don't remember what? Did you ever see this card before?

A. I don't remember.

Q. Do you understand the question? I am going to ask you another question. Have you ever been in Denver except this trip two weeks ago; Denver, Colorado?

A. Yes, sir.

Q. When?

A. I don't remember.

Q. Well, approximately; one week, six weeks, a year or how long ago? Answer the question please.

A. I don't remember.

Mr. MAGUIRE: If the court please, this is absolutely impossible.

Mr. CANNON: About how long ago were you there, as near as you can remember? You have some idea?

A. I was there two weeks ago.

Q. Well, prior to that time, when were you there, or for how long?

A. I was very ill. I was under the doctor's care for 3 weeks.

Mr. MAGUIRE: What year was that in, do you remember?

A. That was two weeks ago.

Q. Was that the only time you ever were in Denver? You know whether you were in Denver before that or not?

A. I refuse to answer that question?

Q. Why so? Why do you refuse to answer that?

Mr. MAGUIRE: I can't make the witness—I can't speak for the witness. I decline to pursue the investigation any further.

Mr. CANNON: I will ask you a few questions myself.

Miss Wood, have you ever practised prostitution any place at any time? Yes, or no. I don't ask for any details, just whether you did or not. Just yes or no.

A. I refuse to answer that question.

Q. Upon what ground? Have you any reason for declining to answer that question? So far as I can see, I can say this much to you. That question does not intend to incriminate you in any way. I do not

ask you whom you committed adultery with, but I want to know whether you practiced prostitution at any time in any place. You decline to answer that do you? I don't see how there is any chance to make any headway here.

Mr. MAGUIRE: I renew my motion.

Mr. CANNON: Have you any further evidence?

Mr. MAGUIRE: No further evidence this afternoon. There is one or two questions that I believe I will ask the witness.

Q. How long have you known this Jacob Gronich?

A. Since I have been married to him.

Q. Well, how long has that been?

A. A little over two years.

Q. Where were you married to him?

A. Cleveland, Ohio.

Q. At what time of the year?

A. It was in December.

Q. And before whom and by whom were you married?

A. In the court house.

Q. What court house?

A. The county court house, by the squire.

Q. Do you remember his name?

A. I do not remember it.

Q. Do you remember who were the witnesses?

A. Yes, one of the clerks.

Q. Under what name were you married?

A. Under the name of Kramer.

Q. You gave your name as what?

A. Grace Reimers.

Q. And what name did this defendant use?

A. Kramer.

Q. What was the first name?

A. Jacob.

Q. How did he spell it?

A. J-a-c-o-b.

Q. I mean Kramer?

A. K-r-a-m-e-r.

Q. Who else was a witness besides the clerk of the court?

A. That was all.

Q. Had you ever been married before?

A. No, sir.

Q. You say the judge married you there?

A. Yes, sir.

Q. You are sure it was in December?

A. Yes, sir.

Q. You are positive as to that?

A. I am pretty sure.

Q. What day in December?

A. The 10th day of December.

Q. Is Jacob Kramer the defendant's right name?

A. No, his right name, I think, is Jacob Gronich. His people are Jewish and I am a Gentile. His people did not want him to marry me.

Q. Where are these people—his people?

A. I do not know.

Q. When did you leave Cleveland?

A. I left Cleveland five weeks ago.

Q. And who came with you?

A. My husband.

Q. Anyone else in the party?

A. Yes, sir.

Q. Who?

A. I think a lady and a gentleman. I do not know who they were. They did not leave with us. They were on the train.

Q. What are the names of this lady and gentleman?

A. Her first name is May. That is all I know.

Q. What is his name?

A. I don't remember.

Q. Do you know his first name?

A. I think she called him Joe. I remember once she called him Joe.

Q. What did you call him when you talked to him?

A. I never spoke to him.

Q. And how far did this couple accompany you and Mr. Gronich?

A. To Portland.

Q. Did you stop any place on the way?

A. I was very ill in Denver.

Q. Had you stopped any place before reaching Denver?

A. No, sir.

Q. Where did you stay in Denver? At what hotel? What is the name of the hotel?

A. I don't remember.

Q. You don't remember the name of the hotel?

A. No, sir.

Q. Was it the Bush or Rush hotel? Does that sound like it?

A. Yes, sir, that sounds like it.

Q. It was something like that?

A. I don't know; I was ill at the time.

Q. Did you practice prostitution in Denver?

A. No, sir.

Q. Did you go out with any other men?

A. No, sir, I was very ill.

Q. You were under the doctor's care all the time you were there?

A. Yes, sir.

Q. I will show you a photograph and ask you if you ever saw that before?

A. Yes, sir. Those are the same people that were on the train with us.

Q. That is your photograph?

A. The top one.

Q. Who is this?

A. That is the lady I met on the train.

Q. You are sure you met her on the train?

A. I met her once in Cleveland.

Q. Where did you meet her in Cleveland?

A. On the street.

Q. Who introduced you to her? How did you come to meet her?

A. My husband.

Q. Didn't you meet these people in Hot Springs,

Ark? That woman and that man?

A. I don't remember.

Q. Were you ever in Hot Springs, Arkansas, yourself?

A. Yes, sir.

Q. When?

A. I don't remember just when.

Q. Well, how long ago? I am only asking approximately.

A. Last spring.

Q. A year ago?

A. Yes, sir.

Q. Didn't you meet this woman, May, and this man in Hot Springs, Ark. when you were there at that time?

A. I seen her there. That is all I remember.

Q. Where did you see her there and under what circumstances?

A. I remember once seeing her on the street.

Q. And who introduced you to her? If you were introduced.

A. I was not introduced at that time.

Q. Didn't speak to her there?

A. I don't remember.

Q. How do you know you saw her there? How do you know you saw her there?

A. Because I saw her in Cleveland?

Q. Did you see this man that was with this woman in Hot Springs?

A. I don't remember.

Q. You would certainly remember if you saw them, wouldn't you? You would remember that, wouldn't you? Who got the ticket for you and your husband to travel West?

A. I don't remember.

Q. Did you buy it? Did you buy the ticket?

A. I don't remember.

Q. Did you ever see that ticket before?

A. Yes, sir.

Q. Where did you see it?

A. That was the ticket we traveled on.

Q. Whose signature is that on the line marked "Purchaser" for self and party?

A. It is not my signature.

Q. I asked you whose signature it was. Is that your husband's?

A. I think it must be.

Q. Whose is this signature right opposite No. 2645, the words "J. Gronich"? Isn't that your husband's? Look at it carefully.

A. It must be.

Q. And you recognize that to be his, don't you?

A. Yes.

Q. Now, you didn't buy that ticket did you?

A. No, sir.

Q. Your husband bought it, didn't he?

A. Yes, sir.

Q. Where did he buy it?

A. Cleveland, Ohio.

Q. How much did he pay for it?

A. I don't know.

Q. You traveled with him on that ticket, didn't you?

A. Why yes.

Q. You came from Cleveland, Ohio, to Portland, Oregon, did you not?

A. Yes, sir.

Mr. MAGUIRE: The government rests.

Mr. STEPHENSON: We have no testimony to offer, your honor.

Mr. CANNON: Do you want this case continued?

Mr. MAGUIRE: I think it would probably be best to have it continued a week—two weeks, in order to bring testimony out here from Cleveland and Canton, Ohio.

Mr. CANNON: Very well.

Mr. STEPHENSON: That is a long time, your honor, on the showing made here, to hold this man two weeks.

Mr. CANNON: This witness is very unwilling to testify. You don't need to be told that. I will grant the continuance.

Mr. STEPHENSON: I think the bail ought to be lowered, since the Government is going to hunt for testimony, as it has none now, and asks for two weeks more time to go on a fishing trip for new evidence, and there is no prospect of getting anything except prostitution in Cleveland.

Mr. MAGUIRE: Under the circumstances, I will ask that the bail be increased. Probably this is the

most flagrant case that has yet come before the government or the Commissioner.

Mr. STEPHENSON: Where the evidence is small the bail should be increased?

Mr. CANNON: You forget there was some evidence the other day from the lips of the other girl, May Swindle.

Mr. STEPHENSON: Maybe I don't recall that.

Mr. CANNON: I do.

Mr. STEPHENSON: Will your honor please indicate.

Mr. CANNON: Her testimony was to the effect that both she and this girl practiced prostitution in Cleveland; that they came here and were in a house, not exactly a house of prostitution, but a house of that nature, and that that was their business. The practising of prostitution was their business. The inference was pretty strong that they came here to practice prostitution, and so is the testimony of the officers as to the conduct of these two men at the time of their arrest.

Mr. STEPHENSON: Does the government expect it will be able to show this woman practiced prostitution here?

Mr. CANNON: Attempted to practice it here.

Mr. MAGUIRE: The defendant brought her here for that purpose.

Mr. STEPHENSON: Of course, if they can prove that, then my remarks go for nothing. If they are

going to get that testimony back in Cleveland, I think they ought to bring it.

[Endorsed]: Bill of Exceptions. Filed Sep. 16, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 26 day of September, 1913, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:

[Stipulation as to Bill of Exceptions.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX G. COHEN,

Defendant.

At the trial of the above entitled defendant, certain postal cards were introduced by the Government and regularly marked as Exhibits. These postal cards having been received in evidence, they are now missing from the files of the case, and after a strict search, cannot be found. For the purpose of establishing the identity of said postal cards and the contents of the same, it is now STIPULATED that two of said postal cards were written by Jake Gronich to the witness Esther Wood and the third was written by the witness Esther Wood to the said Jake Gronich; that

each of these postal cards tended to show a familiarity between the said witness Esther Wood and the said Jake Gronich; that these postal cards showed upon their face that they were transmitted through the United States mails and postmarked at approximately the time that is charged in the indictment when the defendant Gronich transported the said witness Esther Wood from Denver, Colorado to Portland, Oregon.

Dated at Portland, Oregon, September 26, 1913.

CLARENCE L. REAMES,

Attorney for Plaintiff.

THOMAS MANIX,

Attorney for Defendant.

[Endorsed]: Stipulation. Filed Sep. 26, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of September, 1913, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows, to wit:

[Petition for Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

Now comes Max G. Cohen, defendant herein, and

says that on or about the 2d day of June, 1913, and from day to day thereafter, up to and including the 4th day of June, 1913, the said Max G. Cohen was tried for the crime of subornation of perjury before the Hon. Robert S. Bean, judge of the said court, and on the said 4th day of June, 1913, was found guilty by the jury, and thereafter sentenced by the court; and the said Max G. Cohen says that in the said trial, proceedings and judgment had in the above entitled case, certain errors were committed to the prejudice of this defendant, all of which will appear more in detail from the Assignment of Errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue on his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors as complained of; and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals.

RALPH E. MOODY,
ROSCOE C. NELSON,
THOMAS MANNIX,
Attorneys for Defendant.

[Endorsed]: Petition for Writ of Error. Filed
Sep. 29, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of September,
1913, there was duly filed in said Court, Assign-

ments of Error in words and figures as follows,
to wit:

[Assignments of Error.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

Now comes the defendant, Max G. Cohen, and in connection with his petition for a writ of error, makes the following assignment of errors which, he avers, occurred upon the trial of the above entitled cause, to-wit:

I.

The court erred in overruling the demurrer to the indictment, said demurrer being based upon the following grounds:

1. That more than one crime is attempted to be charged in said indictment, said indictment consisting of one count.
2. That the said indictment fails to state facts sufficient to constitute a crime.
3. That the facts stated in the indictment do not constitute a crime.

II.

The court erred in refusing the motion of the defendant for an order directing the jury to return a verdict of not guilty in the above entitled cause, upon the

following grounds, and for the following reasons, to-wit:

1. That no evidence had been introduced in the trial of said cause upon which a verdict of guilty could be based.

2. That the evidence which has been introduced in this cause was not sufficient to be the basis of a verdict of guilty.

3. That the evidence failed to show that any crime had been committed by this defendant.

4. That the evidence was not sufficient to show that the defendant had committed the crime set forth in the indictment in this cause.

The indictment charges that on or about the 7th day of May, 1912, the defendant Max G. Cohen "did unlawfully, knowingly, feloniously, and corruptly procure, advise, obtain and suborn one Esther Wood to appear as a witness at the trial and hearing of said cause for the United States and to give in evidence before the said United States Commissioner, certain matters material and relevant to the issue in the substance and to the effect following, to-wit: That she the said Esther Wood had never practiced prostitution in Baker, Oregon, and that she, the said Esther Wood had never practiced prostitution in Portland, Oregon, or in Denver, Colorado, or in any other place in the United States, and that the said Esther Wood did not remember having ever received certain postal cards theretofore sent to her by the said defendant Jake Gronich, and that she did not remember or recol-

lect having written or mailed certain postal cards sent to and received by the defendant Jake Gronich."

In regard to the allegations that Esther Wood was suborned by the defendant to appear and perjure herself as alleged, Esther Wood had not been arrested at the time when the defendant is charged with the crime set forth in the Indictment, and no evidence is introduced that she knew she would be arrested.

Esther Wood in testifying what took place in the room at the Oxford Hotel when the government claims that Esther Wood was suborned, testified as follows:

"I saw Mr. Cohen on May 7th at the Oxford Hotel in Miss Heller's room, about a quarter after five. When he came in, I was in the room with Sadie Parker, Rose Heller, and Violet Woods. I wasn't quite sure who sent for him. When he came in I was lying on the bed feeling bad and crying, and as he entered he said, 'Well, well, what is this all about?' and Sadie Parker told him that I was the girl with the two Jewish fellows who had been arrested at the Levens Hotel, whereupon Mr. Cohen mentioned Gronich and Albin, and said he had seen them that morning and that they had been turned over to the Government, and were represented by Dawley, a negro lawyer with whom Cohen said he declined to be connected. Then Cohen asked me if I was married to Jake Gronich, and I hesitated about answering, but Sadie Parker told me that Mr. Cohen was my lawyer, and that I should tell him the truth, and I then told him that I was

married, and had been in Portland a little over a week. I told him that I had sported in Portland one day, and he said, 'Oh well, they won't find that out.' Sadie Parker then told Mr. Cohen, calling him by his first name, that I had worked for her a little over two weeks the preceding winter, and Mr. Cohen told Sadie that she wouldn't have to tell that. Then he said, 'They have to prove that she is a sporting girl.'

Page 48. Mr. Cohen then asked me whether I had any telegrams or letters in my trunk, and I told him that I didn't have any; that all I had consisted of postal cards at different places where I had worked, and he told me, 'Well, if they should show you those, just say you don't remember.' Mr. Cohen asked me if I came direct from Cleveland here, and I told him that May and I had stopped in Denver and had a sporting house together, and Sadie Parker said that if they scared May, she would tell the truth and get me up for perjury, and I asked the meaning of perjury, and Sadie Parker said to tell a lie. And Mr. Cohen said, 'She can deny that she ever sported', and then he said that when they took me down I should see May, because if May told that she and I had sported together, I could say that I did sport, but that I was not brought here for immoral purposes, and when I sported I did it of my own free will; and if May didn't tell I could deny that I sported.

Page 49. Sadie Parker then asked Mr. Cohen if he didn't think it best for me to leave town so that they could not get me, and Mr. Cohen said no, that I might

as well go down and give myself up; that they were bound to get me. Then Mr. Cohen said, 'Now I will give you my card, and in case they do take you, call me up no matter what time it is; you call me up when they come down to take you', and he wrote down his phone number and gave me his card.

Page 50. I told him I had some postal cards in my trunk from different places where I had sported, and he said, 'When they show you, then just say that you don't remember.' He went away just before six, leaving his card, and saying that he had his machine and was going home to supper. I was arrested late that same night about half past ten at the same room in the Oxford Hotel, and was taken to the city jail. Mr. Cohen told me at that time that he had a good stand in with the Government people, and he mentioned the name of assistant district attorney Evans. I told Mr. Cohen at that time that I had practiced prostitution in Baker, Oregon, and also in Denver, Colorado, and that May and I had had a house together."

In cross examination Esther Wood testified as to what took place at the Oxford Hotel on the night it is claimed the defendant suborned her, as follows:

"Page 61. The first time that I ever met Mr. Cohen was at the Oxford Hotel, May 7th. I didn't know him at all before that time. He was there from 5:15 to just before six. It was before six when he left because the girls said they had an engagement to supper at six. Mr. Cohen was there over half an hour,

but not for an hour. I didn't send for him, or request that he be sent for and am not sure who sent for him because I remained in the room. I heard Rose Heller, the girl I stayed with that night at the Oxford, talk about an attorney, but I didn't know she had sent for one. She was there when Mr. Cohen was, and I think but I am not sure, that she sent for him. I talked to him because, just before he came in, I heard one of the girls say they would call him on the phone, and when he came I didn't know he was for me, but they said they would call a lawyer at the telephone, and I was laying on the bed rather sick, and he came in, and Sadie Parker talked to him first, telling him I was the girl with the two Jewish fellows taken out of the Levens Hotel. I said nothing at the time, and Mr. Cohen said he had seen them, referring to the two men who had been arrested that morning, and that they were turned over to the government, and Sadie Parker and she knew that. Mr. Cohen then turned around and said, 'Why this May is married to this Joe Albin.' I had not known that before. He then asked was I married to Jake Gronich, and those were his first words to me. I hesitated to answer, but I told him I was married after Sadie Parker told me that he was my lawyer, and that I should tell him the truth.

Page 65. I had not been arrested at that time. I was arrested that same night about 10:30. (May 7th). I retained Mr. Cohen that afternoon as my lawyer. I paid him nothing for his services. Sadie Parker told

him we were down and out; we didn't have any money, but she would go around among the Jewish people and pick up a collection, and she would pay him. I didn't know whether he was paid anything or not. He asked me once at the city jail if I had any money, and I told him no, but I told him if I did get out that I would pay him. He said, 'That is all right; I am not worrying about that; that is all right.' I told him I was married to Jake Gronich. I told him at that time I had been practicing prostitution in Portland, in Baker City, Denver, Colorado, and Cleveland, Ohio. How I happened to tell him this was that when Sadie said that if they scared May, she would tell everything, and I told him, 'Yes, I worked with her back east.' But he said, 'Well, when you see her, then if she should tell that, then you tell that he didn't bring you here for immoral purposes, and that you did it of your own free will. If she doesn't tell it, deny you sported. That is the only way to save him because they found the receipts, the railroad tickets, right in his pockets.'

Rose Heller in testifying what took place in the room at the Oxford Hotel, when the Government claim that Esther Wood was suborned, testified as follows:

"I remember the night her husband, Jake Gronich, was arrested. Esther Wood at that time was off with me. We were to a show, and separated about one o'clock in the morning. She came back between two and two thirty about, in a taxicab, to room 3 in

the Oxford Hotel, which is my room. She stayed with me a whole night and the next day. This is the first time I have ever seen Mr. Cohen since I got him for Esther Wood. I got him for Esther Wood about the night after Jake was arrested. Mrs. Levens telephoned me and told me to go and get Mr. Cohen. I went to Mr. Cohen's office and left my name with the stenographer; he came down that afternoon to the Oxford, room 3. When he came into the room, there was Sadie Parker, Violet Woods, Esther Wood and myself there. It must have been between four and five o'clock in the afternoon. He stayed about ten or fifteen minutes. After Mr. Cohen came in he asked Esther Wood what the trouble was, and she told him that a man was arrested, and he said he knew all about it. Then she asked him if he wanted to be her attorney. He said yes, but he knew that Jake had got another lawyer, and he would not mix in. Esther Wood said she sported in Baker and Astoria, that is all, and then Sadie Parker spoke up and said, 'She worked for me one day up in my house.'

Page 103. Q. Was anything said by Mr. Cohen as to what Esther Wood should say in regard to her having practiced prostitution?

A. Well, he told her to say that she didn't sport.

Q. Was anything said about May Swindle?

A. No, I didn't hear nothing about it.

On cross examination, Rose Heller testified in substance as follows:

Page 103. I am held as a witness in this case, also

for Jake Gronich. I wasn't put in jail. I testified in this case.

After Mr. Cohen first came into the room, the first thing that happened was that Esther Wood asked him if he could not be her attorney, and he said he could not take the case for Jake Gronich had got another lawyer. She asked him if he could be Jake Gronich's attorney. Mr. Cohen said, 'Well', he said, 'if they will discharge this other lawyer he will take the case.' Esther cried, and I told her not to cry, that everything would be all right; and then she wanted to run away. Mr. Cohen said, 'You better stay here, for' he said, 'it is no use to run away. You might as well go to the court and give yourself up.' Then there was a whole bunch of them in the room; they were talking all kinds of language, and I don't know what they said. Esther said she sported in Baker and Astoria, and worked here for Sadie one day. I don't remember how she happened to tell Mr. Cohen about that. She told Mr. Cohen herself she was married; Mr. Cohen didn't ask her. Mr. Cohen didn't ask her whether she had been sporting. I didn't hear anything about Denver. But just those two towns, Baker and Astoria that is all. After she told him that, Mr. Cohen said, 'You don't have to say that; they won't find that out.' He told her not to say that she had been sporting. I can't remember his exact language. The only words that I remember are that she said she was sporting in Baker and Astoria, and here one day for

Sadie Parker. Those few words I remember, and Cohen said 'You don't have to say you sported', he said, 'they won't find you out.' At that time Esther had not been arrested, and nobody knew that she would have to testify any place. Esther knew that she was going to be arrested because she heard that Gronich was,—that the government had got in, so she knew that there was no chance for her to run away. I do not remember hearing Esther Wood in that conversation say anything about anything else."

Violet Woods, testifying about the matters occurring at the room in the Oxford Hotel on the night in question, testified as follows:

"I live at the Levens Hotel, and my occupation is a sporting girl. I am acquainted with the defendant, Max G. Cohen. I have seen him once, that was the day after Gronich's arrest, either May 6 or 7, 1912. I was in Rose Heller's room before he came in, Rose Heller, Esther Wood and Sadie Parker were also there. It was some time after five o'clock before he arrived. I think he stayed about half an hour. I don't know whether Sadie Parker or Rose Heller called for him. Esther Wood was on the bed crying, and Mr. Cohen said, 'What does this mean, and what is this about?' Sadie Parker says, 'She is the girl of the two fellows that were taken last night.' Mr. Cohen said, 'Yes, I just came, I was up there and saw them turned over to the marshal' and he said, 'they have a colored lawyer.' Sadie Parker asked if he could do anything. He asked Esther if she was mar-

ried, and Esther hesitated, and she didn't want to say anything, and Sadie Parker said, 'Esther you can tell Max because he is your lawyer, and he can see what he can do for you', and Esther didn't want to tell him anything at first, and finally we told her, all of us, 'Go ahead, tell Max Cohen; maybe he can do something for you.' Esther started to tell about her case, and she said, 'We came here with this May and this Joe,' and he said, 'Yes, I know, I have heard May was married to him', and Esther spoke up and said, 'Is that so?' She was kind of surprised, and he said, 'Yes I think she said she was married', and so Sadie Parker handed Esther \$3.00 and she said I would give her \$5. and we would see if we could not get her away from here. Mr. Cohen said that would not do; 'It is no use for her to go away' as we asked him if that would not be best. He said, 'No, I wouldn't advise her to go away; if she goes away she might just as well give herself up to the government, go up and give herself up.' He said, 'She has no chance to get away', and Esther had told him the different places where she had been, and she told him where she had sported one day here. She said about these different places, 'What will they do if they find out?' And Mr. Cohen said, 'Well, have you sported since you have been back?' She said, 'Yes I have sported one day on Third Street since I have been back'. Sadie Parker then said, 'She worked for me last year about Christmas day, something like that', and he said, 'They won't find that out; you can say you were

rooming there' and Sadie Parker said, 'She has been at Astoria', and Esther Wood spoke up and told Mr Cohen that when she was on her way out here she had a house with May in Denver, and she said she was here last year in Baker City, and sported in Astoria and Portland since she came back, and he said, 'They will have to prove you have been sporting; I don't think they can find out.' And Esther Wood said, 'What will I do if they do find out?' He said, 'Well, if they do find out, May has told you have (been sporting) just find out she has told. They might scare you and tell you, but find out for yourself. Then you can say you did it of your own accord, but your husband didn't know anything about it, and if she tells you have been sporting, say that Jake didn't know anything about it', that she had done it of her own free will, and if May didn't tell, Mr. Cohen told her to deny that she had ever been sporting.

Page 118. Mr. Cohen asked her if she had any letters or telegrams in her trunk and she said she didn't know whether she had any letters or telegrams or not, but thought she had some postals that Jake sent her, and that they were in Jake's handwriting, and Mr. Cohen said, 'Well, if they show you those postals, you can say you don't remember anything about them; you don't remember them.' "

On cross examination Violet Woods, so far as material to this exception, testified as follows:

"There were five of us in the room including Mr. Cohen, and all the conversation was held openly in

the presence of everybody. Mr. Cohen asked Esther first how long she had been back, and she said just a few days, and he asked her had she been sporting since she came back, and Esther didn't want to say anything. After that Esther started to tell him that she came out here with May and Joe Albin. I told Mr. Cohen I was down in Astoria and Esther was sporting there, and Mr. Cohen said, 'Well, they can't find that out; they will have to prove it.' And Esther asked what she should do if May told they had had a house in Denver, and Mr. Cohen said that she should find out first that May had told, and if May had told, that she could say that she did it without her husband's knowing it and of her own free will; and that if May didn't tell, she could deny she had been sporting. He told her twice she could deny it. At that time Esther Wood had not been arrested and nobody had seen her."

The other conversations between Esther Wood and the defendant taking place after her arrest as she claims, are uncorroborated by any other testimony.

III.

The court erred in allowing to be introduced by the Government the complaint against Jacob Gronich filed in the preliminary hearing before Commissioner Anderson M. Cannon, said complaint being Government's Exhibit 1, reading as follows:

UNITED STATES OF AMERICA,

District of Oregon.—ss.

Complaint for violation of White Slave Traffic Act.

THE UNITED STATES,

vs.

JAKE GRONISH

Before me, the undersigned, a United States Commissioner for the District of Oregon, personally appeared this day Charles P. Pray, who, on oath deposes and says that the said Jake Gronich on or about the 8th day of April, 1912, at Cleveland in the State and District of Ohio, did unlawfully, knowingly and feloniously procure and obtain a ticket and tickets and form of transportation and evidence of right thereto to be used in interstate commerce by a woman, to-wit, Esther Wood in going from the said Cleveland, in the State of Ohio to Denver in the State of Colorado, and from the said Denver in the State of Colorado to Portland in the State and District of Oregon and within the jurisdiction of this court, for the purpose of prostitution and debauchery and for an immoral purpose, towit: that she, the said Esther Wood should live with him the said Jake Gronich, as his concubine, whereby the said woman, to-wit Esther Wood was transported in interstate commerce from Cleveland in the State of Ohio to the City of Denver in the State of Colorado and from the said Denver in the State of Colorado to Portland in the State and District of Oregon, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And furthermore the said deponent says he has reason to believe, and does believe that Esther Wood

and May Swindle alias May Weller are material witnesses to the subject matter of this complaint.

CHARLES P. PRAY.

Subscribed and sworn to before me this 7th day of May, 1912.

A. M. CANNON,
United States Commissioner.

The said complaint was immaterial to the issue involved in this cause; and is further immaterial on the ground that there is nothing therein contained showing the materiality of the testimony given at the said preliminary hearing by the government's complaining witness, Esther Wood, and it does not appear in what respect or in what manner the testimony of said witness was material to the issue involved in the preliminary hearing before Commissioner Cannon, nor was there any evidence introduced to show the materiality of the same, in the above entitled trial, the issue to be determined at said hearing being whether the government had probable cause to hold Jake Gronich on the charge of the violation of the White Slave Traffic, and although the indictment charges that the defendant suborned Esther Wood to give false testimony at the trial, the record shows that the hearing before the United States Commissioner Cannon to determine whether Jake Gronich should be held for violating the White Slave Traffic Act was not a trial in the proper sense of the word.

IV.

The court erred in the admission of testimony of-

ferred by the Government in the following instance, to-wit: the testimony given by Esther Wood at the preliminary hearing before Commissioner Cannon to the effect that she did not practice prostitution in Baker, Oregon, in Portland, Oregon, Denver, Colorado, or anywhere else in the United States; and further testimony given at the trial of the above entitled cause, at which trial the said Esther Wood testified in substance, so far as relevant, as follows:

"I have lived in Baker City, Ore., Denver, Colorado, Cleveland, Ohio, Astoria, Oregon, and Portland, Oregon and I have practiced prostitution in all these different places. At the preliminary hearing on the complaint against Jake Gronich before Commissioner Cannon, I was asked whether I had ever practiced prostitution at Baker, Denver or Portland, or any other place in the United States, and I answered no, whereas, as a matter of fact, I had practiced prostitution in the said places."

There was no evidence introduced at the trial to show that this testimony was material to the issue raised at the hearing before Commissioner Cannon on the said complaint against Jake Gronich for violation of the White Slave Traffic Act.

V.

The court erred in allowing the introduction of certain postal cards by the government, marked Government's Exhibits 4, 5 and 6 at the preliminary hearing before United States Commissioner Cannon, at which hearing Jake Gronich was charged with viola-

tion of the White Slave Traffic Act. Esther Wood testified in substance that she did not remember having ever received certain postal cards theretofore sent to her by the said defendant, Jake Gronich, and that she, the said Esther Wood, did not remember or recall having written or received certain post cards sent to and received from the said defendant, Jake Gronich. Her testimony, so far as relevant, is in substance as follows:

“At the preliminary hearing before United States Commissioner Cannon they exhibited to me the card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colo. I don’t remember just when. Another card, Gov. Ex. 5, was exhibited to me at the preliminary hearing. Jake Gronich sent this card to me, and I got it in Portland. At the preliminary examination before United States Commissioner Cannon, they asked me if I had ever seen this card, and I remember saying once no, and again that I didn’t remember. At the time I so testified I did remember seeing the card before, and I knew that I was swearing falsely, but so testified because my lawyer advised me to. As to Gov. Ex. 6, at the preliminary hearing, before U. S. Commissioner Cannon, they asked me if Jake Green sent me this postal card, and asked me if I knew any fellow named Jake Green, and I said no, and they asked me if he sent it to me, and I said no and again that I didn’t remember. At the time I did remember. A card was exhibited to me which was in my own

handwriting, and they asked me if it was my handwriting and I said no, and they asked me again, and I said I didn't remember; and they asked me had I ever seen the card before, and I told them that I didn't remember. And at the time I so testified I knew I had seen it before, and I did remember, and I so testified because my attorney advised me to."

Because of the loss of the postal cards herein mentioned the following stipulation was entered into between the parties:

*In the District Court of the United States for the
District of Oregon.*

STIPULATION.

UNITED STATES OF AMERICA,

v.

MAX G. COHEN,

Defendant.

At the trial of the above entitled defendant, certain postal cards were introduced by the government and regularly marked as exhibits. These postal cards having been received in evidence, they are now missing from the files of the case, and after a strict search cannot be found. For the purpose of establishing the identity of said postal cards and the contents of the same, it is now stipulated that two of said postal cards were written by Jake Gronich to the witness Esther Wood and the third was written by the witness Esther Wood to the said Jake Gronich; that each of these postal cards tended to show a familiarity be-

tween the said witness Esther Wood and the said Jake Gronich; that these postal cards showed upon their face that they were transmitted through the United States mails and postmarked at approximately the time that is charged in the indictment when the defendant Gronich transported the said witness Esther Wood from Denver, Colorado, to Portland, Oregon.

Dated at Portland, Oregon, September 26, 1913.

CLARENCE L. REAMES,

Atty. for plaintiff.

THOMAS MANNIX,

Atty. for defendant.

There was no evidence introduced at the trial of the above entitled cause between the United States Government and Max G. Cohen, to show in what respect or in what manner the testimony in regard to the foregoing post cards was material to the issue involved in the preliminary hearing before commissioner Cannon between the U. S. Government and Jake Gronich; nor was there any evidence introduced to show the materiality of the same in the above entitled trial.

VI.

The court erred in admitting the testimony of Esther Wood to the effect that she swore falsely in reference to her prostitution, in the preliminary hearing before the United States Commissioner Cannon wherein Jake Gronich was charged with violating the White Slave Traffic Act, as well as to the effect that she swore falsely relative to the postal cards introduced in evidence and marked Gov. Exs. 4, 5 and 6,

for the reason that she, the said Esther Wood, was the wife of Jake Gronich, and for that reason her testimony against Jake Gronich was incompetent. In so far as relevant, Esther Wood testified as follows, in substance:

"I lived in Baker City, Oregon, Denver, Colorado, Cleveland, Ohio, Astoria, Oregon and Portland, Oregon, and I have practiced prostitution in all these different places. At the preliminary hearing on the complaint against Jake Gronich before U. S. Commissioner Cannon, I was asked whether I had ever practiced prostitution in Baker or Denver or Portland or any other place in the United States, and I answered no, whereas, as a matter of fact I had practiced prostitution in the said places, and I gave such testimony falsely because the defendant Max G. Cohen, had advised me so to do."

In regard to the postal cards, Esther Woods testified in substance as follows:

"At the preliminary hearing before United States Commissioner Cannon, they exhibited to me a card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colorado, I don't remember just when. Another card, Gov. Ex. 5, was exhibited to me at the preliminary hearing. Jake Gronich sent this card to me and I got it in Portland. At the preliminary examination before U. S. Commissioner Cannon, they asked me if I had ever seen this card, and I remember saying no, and again that I didn't remember. At the time

I so testified I did remember seeing the card before and knew that I was swearing falsely, but I so testified because my lawyer advised me to. As to Gov. Ex. 6, they asked me at the preliminary hearing if Jake Green sent me this postal, and asked me if I knew any fellow named Jake Green, and I said no, and they asked me if he sent it to me, and I said once no, and again that I didn't remember. At the time I did remember. A card was exhibited to me which was in my own handwriting, and they asked me if it was my handwriting, and I said no, and they asked me again and I said I didn't remember, and they asked me had I ever seen the card before, and I told them I didn't remember and at the time I so testified I knew that I had seen it before, and did remember, and I so testified because my attorney advised me to."

It also appeared from the testimony that Esther Wood had been married to Jake Gronich at Cleveland, Ohio, Dec. 10, 1910, and that at the date of the trial of the above entitled cause, the said Jake Gronich and Esther Wood were still husband and wife and had never been divorced.

VII.

The court erred in giving the following instruction:—

Now it appears, or there is evidence tending to show that Esther Wood was the wife of Gronich at the time of his arrest and had been for some time prior thereto. That would not excuse him from a violation of the white slave traffic act. No man has

a right to transport his own wife from one state to another for the purpose of prostitution, so the fact that she was his wife would be wholly immaterial upon that inquiry or upon this.

VIII.

The court erred in giving the following instruction:

Now something has been said about the manner in which Miss Wood was treated before the Commissioner. Now, I do not think that is very material in this case. If she was sworn and testified as a witness in that case and knowingly and wilfully testified falsely, she committed perjury, and that is about all that is necessary to be said about that matter. It is one of the facts in the case and you have a right to weigh it along with all the other testimony in the case: but however badly she may have been treated or however wrongly she may have been treated would be no justification or excuse on behalf of this defendant if, as a matter of fact, she committed perjury at his request or his instigation.

The evidence shows that Esther Wood was married to Jake Gronich at Cleveland, Ohio, on the 10th day of December, 1910, and that she was the wife of Jake Gronich at the time of the preliminary hearing before U. S. Commissioner Cannon, at which hearing Jake Gronich was complained of for violation of the White Slave Traffic Act. At the said hearing the said Esther Wood was subjected to threats of imprisonment unless she testified at the said hearing against

the said Jake Gronich, as appears from Gov. Ex. 3 attached to the bill of exceptions.

At the preliminary hearing appears from the record, Gov. Ex. 3, p. 2, in the testimony of Esther Wood:—

Mr. CANNON: You understand you can be punished for your attitude?

A. Yes, sir.

Q. Do you prefer to be punished and kept in jail rather than testify?

A. Yes, sir.

Q. Very well then, Miss Wood, this is probably what will happen to you unless you do testify. You will probably have to go to jail for an indefinite time, if you prefer to do that rather than answer simple question.

* * * *

Mr. MAGUIRE: Q. What is your name?

A. I refuse to talk. I told you once.

Q. How old are you? Do you refuse to answer that? Where have you lived in the last two years? Do you refuse to answer that question also?

A. Yes, sir.

Q. On what ground?

Mr. CANNON: I don't think there is any use in pursuing this hearing any further. I think I will—

Mr. STEPHENSON: I would like permission, if your honor please, to ask the witness one question.

Mr. MAGUIRE: If the court please, I object to that. The government, I think, has subpoenaed this witness, and as she has refused to testify, that is no

chance for any cross examination.

Mr. CANNON: I presume that is technically correct, although I don't care to put an incompetent witness in jail, if she is, as a matter of fact, incompetent.

* * * *

Q. Where have you lived in the last two or three years?

A. I refuse to answer any further. * * I will answer all questions as soon as I have seen my attorney. I haven't talked to him. I was very ill. I didn't talk to him.

Mr. MAGUIRE: Her attorney has been notified of the time of the hearing and he has already told Mr. Pray and myself over the telephone that he had advised her to tell the truth about the matter, so there is no excuse for her attitude.

Mr. CANNON: If she is incompetent, there is no use for me to commit her.

Mr. MAGUIRE: She is not incompetent. I believe counsel's position is this; that she is incompetent to testify against this defendant because there may be a marriage relation claimed between them.

Mr. CANNON: I understand that is the rule.

Mr. MAGUIRE: I think if the court please that I will ask for a continuance of this case pending some decision one way or the other as to her being competent and it may be quite likely she will change her mind when she understands more fully.

Mr. CANNON: I think she will. I will continue the case and you can call it up at any time you see fit.

Mr. CANNON: I will do this. I will take this case under advisement, and this witness will be committed to the county jail pending a decision in the matter, and I don't know just when I will be able to decide it, and her bond will be fixed at \$2500."

Mr. MaGuire was Deputy United States District Attorney.

Thereafter the witness, Esther Wood, gave her testimony at the preliminary hearing, as appears from Government Exhibit 3.

WHEREFORE defendant prays that the judgment and the proceedings of the said District Court, may be reversed.

RALPH E. MOODY,
ROSCOE C. NELSON,
THOMAS MANNIX,
Attys. for Dft.

[Endorsed]: Assignments of Error. Filed Sept. 29, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of September, 1913, there was duly filed in said Court, an Order Allowing Writ of Error, in words and figures as follows, to wit:

[Order Allowing Appeal.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

This 30 day of September, 1913, comes the defendant, by his attorney, and files herein and presents to the court a petition praying for allowance of a writ of error and assignment of errors intended to be urged by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises.

ON CONSIDERATION WHEREOF the court does allow the Writ of Error, and orders that the same shall operate as a supersedeas of the sentence and judgment given in the said District court, and that a transcript of the record, proceedings and papers in this case duly authenticated shall be sent to the Federal Circuit Court of Appeals.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 30 day of September, 1913, there was duly filed in said Court, an Undertaking on Writ of Error, in words and figures as follows, to wit:

[Undertaking on Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

No. 5829.

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

WHEREAS, on the 4th day of August, 1913, the above named defendant, Max G. Cohen, was convicted in the above entitled court and cause, of the crime of subornation of perjury alleged in the indictment to have been committed by the defendant's suborning one Esther Wood to commit the crime of perjury within said District of Oregon; and

WHEREAS, on the said 4th day of August, 1912, the said Max G. Cohen was by the said District Court for the District of Oregon, sentenced to serve a term of two years in the Federal penitentiary at McNeil's Island, and to pay a fine of One Hundred Dollars; and

WHEREAS, the said defendant has appealed from said judgment of conviction, to the Circuit Court of Appeals for the Ninth Circuit and has presented to the District Court of the United States for the District of Oregon, his petition for a writ of error and his assignments of error, and on account thereof, said District Court did on the 30th day of September, 1913, allow said writ of error and granted a stay of execution of said sentence pending the final decision of said cause upon such appeal; and

WHEREAS, as a condition precedent to the granting of said order allowing said writ of error and staying said execution, the said defendant did by its order direct that the said defendant give bond in the sum of Ten Thousand Dollars.

NOW THEREFORE, in consideration of the premises and of such appeal, we, Max G. Cohen as principal, and Grace Cohen and M. Pollay as sureties,

do jointly and severally acknowledge ourselves to be indebted to the United States of America in the full sum of Ten Thousand Dollars lawful money of the United States, to be paid to the United States of America, and to be levied upon all of our goods, chattels, lands, tenements and all other property, upon, however, this condition:

That if the said Max G. Cohen shall personally appear in the District Court of the United States for the District of Oregon when he shall be called upon or lawfully required by order of court or law so to do, and thereupon answer all matters and things as may be charged against him on behalf of the United States relative to or pertaining to such conviction as herein recited and shall at all times hold himself amenable and subject to the orders, the process and the commitment of the said District Court of the United States for the District of Oregon, and of the said Circuit Court of Appeals, as shall hereafter from time to time be made by said courts or either thereof, and shall at all times abide the orders and the judgments of said courts in said matters, and in event that said judgment shall be affirmed by the said Circuit Court of Appeals, will at all times hold himself in execution of said sentence, then this undertaking shall be void, otherwise it is to be and always remain in full force and effect.

MAX G. COHEN (Seal)

GRACE COHEN (Seal)

M. POLLAY (Seal)

Signed, sealed and acknowledged this 30 day of September, 1913, before Frederick H. Drake, United States Commissioner for the District of Oregon.

(SEAL) FREDERICK H. DRAKE,
United States Commissioner for the
District of Oregon.

[Endorsed]: Undertaking on Appeal. Filed Sep. 30, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 9 day of October, 1913, there was duly filed in said Court, a Writ of Error, in words and figures as follows, to wit:

[Writ of Error.]

*In the United States Circuit Court of Appeals
for the Ninth District.*

MAX G. COHEN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

THE UNITED STATES OF AMERICA, ss.

The President of the United States of America.

To the Judge of the District Court of the United States for the District of Oregon: Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable R. S. Bean,

one of you, between United States of America, Plaintiff and Defendant in Error, and Max G. Cohen, Defendant and plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States this 9th day of October, 1913.

(Seal)

A. M. CANNON,
Clerk of the District Court of the United
States for the District of Oregon.

[Endorsed]: Writ of Error. Filed Oct. 9, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 9th day of October, 1913, there was duly filed in said Court, a Citation on Writ of Error, in words and figures as follows, to wit:

[Citation on Writ of Error.]

UNITED STATES OF AMERICA,

District of Oregon.—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Max G. Cohen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 9th day of October, in the year of our Lord, one thousand, nine hundred and thirteen.

R. S. BEAN,
Judge.

Service of the within Citation admitted at Portland, Oregon, this 9th day of Oct, 1913.

CLARENCE L. REAMES,
United States Attorney.

[Endorsed]: Citation on Writ of Error. Filed
Oct. 9, 1913.

A. M. CANNON,
Clerk.

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In the United States Circuit Court of Appeals

NINTH CIRCUIT

FEBRUARY TERM, 1914

UNITED STATES OF AMERICA,	}	No. 2339.
Respondent		
vs.		
MAX G. COHEN,	}	
Defendant-Appellant		

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Max G. Cohen, a practicing attorney of the City of Portland, Oregon, the defendant in the court below, was indicted for subornation of perjury and was found guilty by the jury at the trial on the 4th day of June, 1913, and thereafter sentenced to two years' imprisonment and to pay a fine of \$100. The circumstances out of which the case arose are as follows:

One Jake Gronich was arrested prior to May 7, 1912, for violation of the White Slave Traffic Act, in that he was accused of transporting one Esther Wood, who was his wife, from Cleveland, Ohio, to Portland, Oregon, for immoral purposes.

Jake Gronich was arrested and his preliminary hearing was had before United States Commissioner Cannon on or about the 9th day of May, 1912.

His wife, Esther Wood, was arrested on or about the 7th day of May, 1912, and held as a witness, and at the hearing she was compelled, under various threats of imprisonment for contempt, to testify against the said Gronich, although both the United States Commissioner and the United States District Attorney were informed that she was the wife of the defendant Gronich.

As appears from Government Exhibit 3, attached to the Bill of Exceptions, Esther Wood at the hearing in answer to questions relative to her having practiced prostitution in various places, and also relating to certain postal cards claimed to have been sent by Jake Gronich, denied that she had practiced prostitution, and said that she did not remember about the postal cards.

The indictment against the defendant, Max G. Cohen, was based upon the claim that this testimony given by Esther Wood at the preliminary hearing before United States Commissioner Anderson M. Cannon was false and that the defendant, Max G. Cohen, procured, advised, instigated and caused Esther Wood to swear falsely at the said hearing.

At the trial of Max G. Cohen on the issue of subornation the Government's case hinged on the testimony of three self-confessed habitual prostitutes,

Esther Wood, Rose Heller and Violet Woods, who testified as to the conversation which took place in the Oxford Hotel in the City of Portland, where the defendant, Max G. Cohen, was called about five o'clock in the afternoon of May 7, 1912, and at which place and time the Government claims he advised Esther Wood to swear falsely regarding her prior prostitution and the receipt and sending of the postal cards.

No motive for the subornation was shown, and Max G. Cohen had no connection with the preliminary hearing save his visit to the Oxford Hotel by request on the 7th day of May, 1912, to confer with Esther Wood, whom he did not know, and his gratuitous appearance at the preliminary hearing at which he was informed by the United States deputy attorney that he was not in the case at all and that his presence was resented. (See Gov. Ex. 3, page 6.) *At the time of the conversation referred to between Max G. Cohen and Esther Wood, Esther Wood had not been arrested or subpoenaed as a witness for the preliminary hearing or on any other matter connected with the case.*

QUESTIONS INVOLVED.

The questions involved and the manner in which they are raised are shown in the following

ASSIGNMENTS OF ERROR.

I.

The court erred in overruling the demurrer to

the indictment, said demurrer being based upon the following grounds:

“a. That more than one crime is attempted to be charged in said indictment, said indictment consisting of but one count.

b. That the said indictment fails to state facts sufficient to constitute a crime.

c. That the facts stated in the indictment do not constitute a crime.”

Our contention with relation to this assignment is that an United States commissioner is without jurisdiction to *try* any *issue* between the United States of America and a person charged with violation of the White Slave Traffic Act. Hence the demurrer to indictment in this case charging perjury in the trial of such an *issue* before an United States commissioner should have been sustained.

State v. Furlong, 26 Me. 69.

II.

The court erred in refusing the motion of the defendant for an order directing the jury to return a verdict of not guilty in the above entitled cause upon the following grounds and for the following reasons, to-wit:

“a. That no evidence had been introduced in the trial of said cause upon which a verdict of guilty could be based.

b. That the evidence which had been introduced in this cause was not sufficient to be the basis of a verdict of guilty.

c. That the evidence failed to show that any crime had been committed by this defendant.

d. That the evidence was not sufficient to show that the defendant had committed the crime set forth in the indictment in this cause."

The indictment charges that on or about the 7th day of May, 1912, the defendant, Max G. Cohen, "did unlawfully, knowingly, feloniously and corruptly procure, advise, obtain and suborn one Esther Wood to appear as a witness at the trial and hearing of said cause for the United States and to give in evidence before the said United States Commissioner certain matters material and relevant to the issue in the substance and to the effect following, to-wit: That she, the said Esther Wood, had never practiced prostitution in Baker, Oregon, and that she, the said Esther Wood, had never practiced prostitution in Portland, Oregon, or in Denver, Colorado, or in any other place in the United States, and that the said Esther Wood did not remember having ever received certain postal cards theretofore sent to her by the said defendant, Jake Gronich, and that she did not remember or recollect having written or mailed certain postal cards sent to and received by the defendant Jake Gronich."

In regard to the allegations that Esther Wood was suborned by the defendant to appear and perjure herself as alleged, Esther Wood had not been arrested at the time when the defendant is charged with the crime set forth in the indictment, and no evidence is introduced that she knew she would be arrested.

The points urged in connection with this assignment are:

The essential elements of subornation appear to be:

a. That the testimony of the witness claimed to have been suborned was false.

b. That it was given by him wilfully and corruptly knowing it to be false.

c. That the person claimed to be guilty of subornation knew or believed that such testimony would be false.

d. That he also knew or believed that the person claimed to have been suborned would wilfully and corruptly testify as advised.

e. That the person charged with subornation induced or procured the person claimed to have been suborned to give such false testimony.

f. That the testimony claimed to have been suborned was material.

Boren v. U. S., 144 Fed. 801.

State v. Fahey, 65 Atl. 690.

Commonwealth v. Smith, 11 Allen 243.

Commonwealth v. Douglas, 3 Metcalf 245.

The crime of subornation of perjury cannot be committed unless the person charged with subornation had in mind some particular tribunal or proceeding wherein he intended that the perjury should be committed. And if there are no proceedings instituted of which the accused has knowledge at the time when the crime of subornation of perjury is claimed to have been committed, and the language

claimed to constitute subornation of perjury is equivocal and may have to do with proceedings beyond the pale of the law of perjury, as well as proceedings wherein the crime of perjury may be committed, in such cases there are no facts upon which a charge of subornation of perjury can be predicated. Government detectives, marshals and inquisitors have no right to compel witnesses or persons accused of crime to give them information, and if the advice of an attorney relates or may reasonably relate to such interviews and inquisitions as to judicial proceedings, there is no subornation of perjury.

State v. Howard, 38 S. W. 908.

State v. Joaquin, 69 Me. 218.

Nicholson v. State, 26 S. E. 360.

In making out a *prima facie* case for the jury, civil or criminal, the trial judge must determine in the first instance, by assuming the truth of all the evidence introduced by the party seeking redress and admitting all reasonable inferences therefrom, whether the contentions of the party seeking redress are made out by the evidence introduced, to the degree of being probable, as distinguished from being merely possible. If the evidence makes the contentions of the party merely possible, he cannot have his case submitted to the jury, for in such case the jury would not be justified in guessing upon the truth of the issue. There must be, in order to make out a *prima facie* case, facts introduced rising above the degree of establishing a possibility, and making it probable that the contention of the party seek-

ing redress is true, before the judge is justified in declaring a *prima facie* case made out

People v. Bennett, 49 N. Y. 137.

Ex parte Meyer, 40 Pac. 953.

State v. Gordon, 76 Pac. 882.

Sparf v. U. S., 156 U. S. 57; 39 L. Ed. 343 at p. 360.

See also *Patty v. Salem Mills*, 53 Or. 357.

See also *Melton v. State*, 158 S. W. 550.

See also particularly the points and authorities under assignment following.

III.

The court erred in allowing to be introduced by the Government the complaint against Jacob Gronich filed in the preliminary hearing before Commissioner Anderson M. Cannon, said complaint being Government's Exhibit 1, reading as follows:

United States of America, District of Oregon, ss.

Complaint for violation of White Slave Traffic Act.

The United States

v.

Jake Gronich.

Before me, the undersigned, a United States Commissioner for the District of Oregon, personally appeared this day Charles P. Pray, who on oath deposes and says that the said Jake Gronich on or about the 8th day of April, 1912, at Cleveland, in the

State and District of Ohio, did unlawfully, knowingly and feloniously procure and obtain a ticket and tickets and form of transportation and evidence of right thereto to be used in interstate commerce by a woman, to-wit, Esther Wood, in going from the said Cleveland, in the State of Ohio, to Denver, in the State of Colorado, and from the said Denver, in the State of Colorado, to Portland, in the State and District of Oregon, and within the jurisdiction of this court, for the purpose of prostitution and debauchery and for an immoral purpose, to-wit: that she, the said Esther Wood, should live with him, the said Jake Gronich, as his concubine, whereby the said woman, to-wit, Esther Wood, was transported in interstate commerce from Cleveland, in the State of Ohio, to the City of Denver, in the State of Colorado, and from the said Denver, in the State of Colorado, to Portland, in the State and District of Oregon, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And furthermore, the said deponent says he has reason to believe, and does believe, that Esther Wood and May Swindle, alias May Weller, are material witnesses to the subject matter of this complaint.

CHARLES P. PRAY.

Subscribed and sworn to before me this 7th day of May, 1912.

A. M. CANNON,
United States Commissioner.

The said complaint was immaterial to the issue involved in this cause; and is further immaterial on the ground that there is nothing therein contained showing the materiality of the testimony given at

the said preliminary hearing by the Government's complaining witness, Esther Wood, and it does not appear in what respect or in what manner the testimony of said witness was material to the issue involved in the preliminary hearing before Commissioner Cannon, nor was there any evidence introduced to show the materiality of the same, the issue to be determined at said hearing having been whether or not the Government had probable cause to hold Jake Gronich on the charge of the violation of the White Slave Traffic, and although the indictment charges that the defendant suborned Esther Wood to give false testimony at the *trial*, the record shows that the hearing before United States Commissioner Cannon to determine whether Jake Gronich should be held for violating the White Slave Traffic Act was *not* a trial.

IV.

The court erred in the admission of testimony offered by the Government in the following instance, to-wit: the testimony given by Esther Wood at the preliminary hearing before Commissioner Cannon to the effect that she did not practice prostitution in Baker, Oregon, in Portland, Oregon, Denver, Colorado, or anywhere else in the United States; and further testimony given at the trial of the above entitled cause, at which trial the said Esther Wood testified in substance, so far as relevant, as follows:

I have lived in Baker City, Oregon; Denver, Colorado; Cleveland, Ohio; Astoria, Oregon, and Portland, Oregon, and I have practiced prostitution in all these different places. At the preliminary hearing on the complaint against Jake Gronich before

Commissioner Cannon I was asked whether I had ever practiced prostitution at Baker, Denver or Portland, or any other place in the United States, and I answered no, whereas, as a matter of fact, I had practiced prostitution in the said places.

There was no evidence introduced at the trial to show that this testimony was material to the issue raised at the hearing before Commissioner Cannon on the said complaint against Jake Gronich for violation of the White Slave Traffic Act.

The points and authorities to which the attention of the court is specially asked in connection with these assignments are:

To establish perjury or subornation of perjury it is necessary not only to show that there was a false statement of fact made under oath, but the prosecution must go farther and show the materiality of the false statement to the issue as well; and this proof cannot be supplied either by opinions or by presumption.

McClelland v. People, 113 Pac. 640.

Bledsoe v. State, 42 S. W. 899.

Brown v. State, 36 S. W. 705.

Commonwealth v. Pollard, 12 Metcalf 225, 229.

Fletcher v. State, 123 Pac. 80.

Wilde v. State, 123 Pac. 85.

People v. Teal, 196 N. Y. 372; 89 N. E. 1086;
25 L. R. A. (N. S.) 120.

U. S. v. Howard, 132 Fed. 325.

Rich v. U. S., 33 Pac. 804.

Lawrence v. State, 2 Texas App. 479.

U. S. v. Shinn, 14 Fed. 447.

And it is not enough to introduce in evidence the record of the case in which it is alleged the false oath was taken. The Government must go further and introduce evidence showing the materiality of the alleged perjured testimony to the issue involved.

McClelland v. People, 113 Pac. 640.

Bledsoe v. State, 42 S. W. 899.

Rich v. U. S., 33 Pac. 804.

The fact of materiality cannot be established by the mere opinions of witnesses.

Washington v. State, 5 S. W. 119.

Foster v. State, 22 S. W. 21.

In testing materiality of testimony charged to be perjured, reference must be had to the issue as it existed when the oath was administered to the witness.

Bullock v. Koon, 4 Wend. 531.

V.

The court erred in allowing the introduction of certain postal cards by the Government, marked Government's Exhibits 4, 5 and 6, at the preliminary hearing before United States Commissioner Cannon, at which hearing Jake Gronich was charged with violation of the White Slave Traffic Act. Esther

Wood testified in substance that she did not remember having ever received certain postal cards theretofore sent to her by the said defendant Jake Gronich, and that she, the said Esther Wood, did not remember or recall having written or received certain post cards sent to and received from the said defendant Jake Gronich. Her testimony, so far as relevant, is in substance as follows:

At the preliminary hearing before United States Commissioner Cannon they exhibited to me the card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colorado. I don't remember just when. Another card, Gov. Ex. 5, was exhibited to me at the preliminary hearing. Jake Gronich sent this card to me and I got it in Portland. At the preliminary examination before United States Commissioner Cannon they asked me if I had ever seen this card, and I remember saying once no and again that I didn't remember. At the time I so testified I did remember seeing the card before, and I knew that I was swearing falsely, but so testified because my lawyer advised me to. As to Gov. Ex. 6, at the preliminary hearing before United States Commissioner Cannon they asked me if Jake Green sent me this postal card, and asked me if I knew any fellow named Jake Green, and I said no, and they asked me if he sent it to me, and I said no, and again that I didn't remember. At the time I did remember. A card was exhibited to me which was in my own handwriting, and they asked me if it was my handwriting, and I said no, and they asked me again, and I said I didn't remember; and they asked me had I ever seen the card before, and I told them that I didn't remember. And at the time I so testified I knew I had seen it before and I did

remember, and I so testified because my attorney advised me to.

(The postal cards mentioned having been lost and misplaced, it has been stipulated that two of the postal cards were written by Gronich to the witness Esther Wood, and the third by the witness Esther Wood to the said Gronich; that each of the cards tended to show familiarity between the said parties, and that they showed upon their face that they had been transmitted through the United States mails and post marked approximately at the time Gronich is charged in the indictment to have transported the witness Esther Wood from Denver, Colorado, to Portland, Oregon.)

There was no evidence introduced at the trial of the above entitled cause between the United States Government and Max G. Cohen to show in what respect or in what manner the testimony in regard to the foregoing post cards was material to the issue involved in the preliminary hearing before Commissioner Cannon between the United States Government and Jake Gronich; nor was there any evidence introduced to show the materiality of the same in the above entitled trial.

The points and authorities in this connection are the same as those set forth under assignment of error No. IV, *supra*.

VI.

The court erred in admitting the testimony of Esther Wood to the effect that she swore falsely in reference to her prostitution in the preliminary hearing before United States Commissioner Cannon, wherein Jake Gronich was charged with violating

the White Slave Traffic Act, as well as to the effect that she swore falsely relative to the postal cards introduced in evidence and marked Gov. Exs. 4, 5 and 6, for the reason that she, the said Esther Wood, was the *wife* of Jake Gronich, and for that reason her testimony against Jake Gronich was prohibited. In so far as relevant, Esther Wood testified as follows, in substance :

I lived in Baker City, Oregon ; Denver, Colorado ; Cleveland, Ohio ; Astoria, Oregon, and Portland, Oregon, and I have practiced prostitution in all these different places. At the preliminary hearing on the complaint against Jake Gronich before United States Commissioner Cannon I was asked whether I had ever practiced prostitution in Baker, or Denver, or Portland, or any other place in the United States, and I answered no, whereas, as a matter of fact, I had practiced prostitution in the said places, and I gave such testimony falsely because the defendant Max G. Cohen had advised me so to do.

In regard to the postal cards Esther Wood testified in substance :

At the preliminary hearing before United States Commissioner Cannon they exhibited to me a card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colorado. I don't remember just when. Another card, Gov. Ex. 5, was exhibited to me at the preliminary hearing. Jake Gronich sent this card to me and I got it in Portland. At the preliminary examination before United States Commissioner Cannon they asked me if I ever seen this card, and I remember saying no and again that I didn't remember. At the time I so testified I did remember seeing the card

before and knew that I was swearing falsely, but I so testified because my lawyer advised me to. As to Gov. Ex. 6, they asked me at the preliminary hearing if Jake Green sent me this postal and asked me if I knew any fellow named Jake Green, and I said no, and they asked me if he sent it to me, and I said no, and again that I didn't remember. At the time I did remember. A card was exhibited to me which was in my own handwriting, and they asked me if it was my handwriting, and I said no, and they asked me had I ever seen the card before, and I told them I didn't remember, and at the time I so testified I knew that I had seen it before and did remember, and I so testified because my attorney advised me to.

It also appeared from the testimony that Esther Wood had been married to Jake Gronich at Cleveland, Ohio, December 10, 1910, and that at the date of the trial of the above entitled cause the said Jake Gronich and Esther Wood were still husband and wife and had never been divorced.

The points and authorities to which the attention of the court is called in connection with this assignment are:

In the case of *U. S. v. Reid et al.*, 12 How. 362, 13 L. Ed. 1023, the rule of practice in the federal courts for the trial of criminal cases is laid down by Chief Justice Taney as follows:

“The rules of evidence in criminal cases are the rules which were in force in the respective states when the judiciary act of 1789 was passed. *Congress may certainly change it whenever they think proper* within the limits prescribed by the Constitution. But no law of a state made since

1789 can affect the mode of proceeding or the rules of evidence in criminal cases.”

See leading cases on same subject, *Logan v. U. S.*, 144 U. S. 263, 36 L. Ed. 429.

While the foregoing rule of practice is still in force in the federal courts, Congress has “certainly” (to use the language of Chief Justice Taney) changed the practice in preliminary hearings of persons accused of crime against the United States by the enactment of Section 1014 of the Revised Statutes of U. S. That section provides that any offender against the laws of the United States may be arrested, imprisoned or bailed, as the case may be, “agreeably to the usual mode of process against offenders in such state.” And this means that in all hearings for the arrest and commitment of offenders against the laws of the United States the then practice of the state court shall be followed.

In re Dana, 68 Fed. 886 at 889.

U. S. v. Sauer, 73 Fed. 671.

U. S. v. Garclon, 82 Fed. 611.

U. S. v. Rundlett, 2 Curt. U. S. 41.

U. S. v. Martin, 17 Fed. 156.

U. S. v. Greene, 108 Fed. 816.

Martin v. U. S., 44 Fed. 405.

U. S. v. Horton, 2 Dillon U. S. 94.

At the time Jake Gronich was arrested for violation of the White Slave Traffic Act, Chapter XCI of Lord’s Oregon Laws was in full force and effect.

This chapter sets forth the procedure in preliminary hearings of persons charged with crime.

Section 1535 of Chapter XXI of Lord's Oregon Laws is as follows :

“In all criminal actions where the husband is the party accused, the wife shall be a competent witness, and when the wife is the party accused, the husband shall be a competent witness; *but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such case unless by consent of both of them*; provided, that in all cases of personal violence upon either by the other, the injured husband or wife shall be allowed to testify against the other.”

This section prescribed the rule by which the United States commissioner was bound in the preliminary hearing of Jake Gronich, in which hearing the *wife* of Jake Gronich, Esther Wood, was *compelled* and *allowed* to be a witness. The civil section of Lord's Oregon Laws, to-wit, Section 733, does not apply in criminal proceedings.

State v. McGrath, 35 Or. 1095; 57 Pac. 321.

State v. Luper, 49 Or. 607; 91 Pac. 444.

State v. Luper, 95 Pac. 811.

Basset v. U. S., 137 U. S. 496; 34 L. Ed. 763.

Section 1535, L. O. L., excepts only cases of “*personal violence* upon either by the other” from the general prohibition of testimony by the husband and wife against each other in criminal proceedings, and personal violence under this statute means *direct*

forcible personal violence upon the *body* of the injured spouse as distinguished from injury to the marriage relation.

The words "*personal violence*" are to be construed according to the ordinary and commonly understood meaning of the words as used by English speaking people. "Violence" imports active force, and the adjective "personal" used to qualify its meaning imports that the violence shall be to the person as distinguished from his abstract or intangible rights.

Basset v. U. S., 137 U. S. 496; 34 L. Ed. 762.

State v. Burt, 17 S. D. 7; 94 N. W. 409; 106 Am. St. Rep. 759 and note.

People v. Curiole, 137 Cal. 538; 70 Pac. 468.

Miller v. State, 40 S. W. 313.

Brock v. State, 71 S. W. 20; 100 Am. St. Rep. 859.

People v. Quanstrom, 93 Mich. 259; 53 N. W. 167; 16 L. R. A. 725.

In re Mayfield, 141 U. S. 113; 35 L. Ed. 637.

Stein v. Bowman, 13 Pet. 209; 10 L. Ed. 129.

Commonwealth v. Sapp, 90 Ky. 580; 29 Am. St. Rep. 405.

The distinction is to be drawn between the statute of Oregon and the statutes of some of the states which do not restrict testimony to matters involving "personal violence," but allow generally testimony of husband and wife when an *offense* has been committed by one against the other. In construing such

statutes some courts have allowed evidence of wrongs by one spouse against the other which were in their nature wrongs against the marital relation rather than wrongs against the spouse by way of "personal violence."

State v. Chambers, 87 Ia. 1; 53 N. W. 1090.

Dill v. People, 19 Colo. 477; 41 Am. St. Rep. 260; 36 Pac. 232.

In a case such as this, where a husband brings his prostitute wife to this state for prostitution with her aid, assistance and consent, this cannot be said, at least if we look at things as they are, to be an act of personal violence, for the harlot in such case is only plying her trade: *Volenti non fit injuria*.

Goldnamer v. O'Brien, 33 S. W. 831.

People v. Cundle, 137 Cal. 538; 70 Pac. 470.

Miller v. State, 40 S. W. 313.

See particularly authorities cited on page 24.

VII.

The court erred in giving the following instruction:

"Now it appears, or there is evidence tending to show that Esther Wood was the wife of Gronich at the time of his arrest, and had been for some time prior thereto. That would not excuse him from a violation of the White Slave Traffic Act. No man has a right to transport his own wife from one state to another for the purpose of prostitution, so the fact

that she was his wife would be wholly immaterial upon that inquiry or upon this."

The points and authorities in this connection are the same as those under assignment of error No. VI, *supra*.

VIII.

The court erred in giving the following instruction:

"Now something has been said about the manner in which Miss Wood was treated before the commissioner. Now, I do not think that is very material in this case. If she was sworn and testified as a witness in that case and knowingly and wilfully testified falsely, she committed perjury, and that is about all that is necessary to be said about that matter. It is one of the facts in the case, and you have a right to weigh it along with all the other testimony in the case; but however badly she may have been treated or however wrongly she may have been treated would be no justification or excuse on behalf of this defendant if, as a matter of fact, she committed perjury at his request or his instigation."

The evidence shows that Esther Wood was married to Jake Gronich at Cleveland, Ohio, on the 10th day of December, 1910, and that she was the wife of Jake Gronich at the time of the preliminary hearing before United States Commissioner Cannon, at which hearing Jake Gronich was complained of for violation of the White Slave Traffic Act. At the said hearing the said Esther Wood was subjected to threats of imprisonment unless she testified at the said hearing against the said Jake Gronich, as appears from Gov. Ex. 3, attached to the bill of exceptions.

At the preliminary hearing appears from the record, Gov. Ex. 3, p. 2, in the testimony of Esther Wood:

Mr. Cannon: You understand you can be punished for your attitude?

A. Yes, sir.

Q. Do you prefer to be punished and kept in jail rather than testify?

A. Yes, sir.

Q. Very well then, Miss Wood, this is probably what will happen to you unless you do testify. You will probably have to go to jail for an indefinite time if you prefer to do that rather than answer simple questions.

* * * * *

Mr. Maguire: Q. What is your name?

A. I refuse to talk. I told you once.

Q. How old are you? Do you refuse to answer that? Where have you lived in the last two years? Do you refuse to answer that question also?

A. Yes, sir.

Q. On what ground?

Mr. Cannon: I don't think there is any use in pursuing this hearing any further. I think I will—

Mr. Stephenson: I would like permission, if your Honor please, to ask the witness one question.

Mr. Maguire: If the court please, I object to that. The Government, I think, has subpoenaed this witness, and as she has refused to testify, that is no chance for any cross examination.

Mr. Cannon: I presume that is technically correct, although I don't care to put an incompetent witness in jail if she is, as a matter of fact, incompetent.

* * * * *

Q. Where have you lived in the last two or three years?

A. I refuse to answer any further. * * * I will answer all questions as soon as I have seen my attorney. I haven't talked to him. I was very ill. I didn't talk to him.

Mr. Maguire: Her attorney has been notified of the time of the hearing and he has already told Mr. Pray and myself over the telephone that he had advised her to tell the truth about the matter, so there is no excuse for her attitude.

Mr. Cannon: If she is incompetent there is no use to commit her.

Mr. Maguire: She is not incompetent. I believe counsel's position is this: that she is incompetent to testify against this defendant because there may be a marriage relation claimed between them.

Mr. Cannon: I understand that is the rule.

Mr. Maguire: I think, if the court please, I will ask for a continuance of this case pending some decision one way or the other as to her being competent, and it may be quite likely she will change her mind when she understands more fully.

Mr. Cannon: I think she will. I will continue the case and you can call it up at any time you see fit.

Mr. Cannon: I will do this. I will take this case under advisement, and this witness will be com-

mitted to the county jail pending a decision in the matter, and I don't know just when I will be able to decide it, and her bond will be fixed at \$2,500.

Mr. Maguire was deputy United States district attorney.

Thereafter the witness Esther Wood gave her testimony at the preliminary hearing, as appears from Government Exhibit 3.

The points and authorities to which the attention of the court is specially asked in this connection are as follows:

The United States commissioner under Section 1535, L. O. L., exceeded his power in compelling or allowing Esther Wood to give evidence under oath against her husband, Jake Gronich, in the preliminary hearing wherein he was charged with a violation of the White Slave Traffic Act, and for that reason a charge of perjury or subornation of perjury cannot be predicated upon such evidence, even though false, for the statute is prohibitive of such evidence except by joint waiver of husband and wife, and there was no waiver here.

U. S. v. Grottkan, 30 Fed. 672.

U. S. v. Bell, 81 Fed. 830.

State v. Trask, 42 Vt. 152.

State v. Furlong, 26 Me. 69.

Collins v. State, 78 Ala. 433.

People v. Fitmus, 102 Mich. 318.

U. S. v. Bedgood, 49 Fed. 54.

U. S. v. Law, 50 Fed. 915.

U. S. v. Howard, 37 Fed. 666.

And when a witness has the right of refusing to testify under the fifth amendment to the Constitution of the United States, which prohibits forced self incrimination, and is nevertheless compelled to testify, such testimony, even though false, cannot be made the basis of a charge of perjury or of subornation of perjury.

U. S. v. Bell, 81 Fed. 830.

See *Brown v. Walker*, 161 U. S. 591.

Pipes v. State, 9 S. W. 614.

See Wigmore on Evidence, Sec. 2251.

ARGUMENT.

The Indictment on Demurrer.

A demurrer was filed challenging the sufficiency of the indictment and pointing out that no crime was sufficiently charged. The indictment states:

“That on, to-wit, the 9th day of May, 1912, there came on to be *tried* before the Hon. Anderson M. Cannon, United States commissioner for the District of Oregon, a *certain issue* in due manner *joined* between the United States of America and Jake Gronich, based upon a certain charge and complaint then and there pending before the said United States commissioner against him, the said Jake Gronich, for a violation of the White Slave Traffic Act.”

And then the indictment sets forth the particular allegations contained in the complaint which charged Jake Gronich with violating the White Slave Traffic Act. Then we find in the indictment the charge “that

before the *trial* of said issue" the defendant suborned Esther Wood. Later in the indictment we find, as appears from page 3 of the record, "that afterwards on, to-wit, the 9th day of May, 1912, the said issue was *tried* and heard before the said United States Commissioner Cannon, etc.," and still further on appears the allegation that the evidence was adduced under the oath of Esther Wood that her testimony "at said *trial* and hearing would be the truth, the whole truth and nothing but the truth, and it did then and there upon said issue, *trial* and hearing become and was a material inquiry whether she had 'practiced prostitution' at different places." And further on in the said indictment we find that "upon the *trial* and hearing of said issue of said cause (she) did wilfully, corruptly and knowingly," etc., swear falsely.

The foregoing statement shows that the indictment charges the subornation of perjury to have been with reference to a *trial* and *issue* therein joined between the United States on one side and Jake Gronich on the other, with United States Commissioner Cannon determining, as a trier of the fact, whether or not Jake Gronich was guilty of the crime charged. Now it is obvious that if such be the fact the United States commissioner was outside of his jurisdiction, for his authority was limited to holding Jake Gronich for the grand jury, and he could not as commissioner try Gronich. No preliminary hearing of Jake Gronich is even mentioned in the indictment.

The defendant herein had the right to have the crime of which he was accused set forth clearly and accurately, and if the facts are as charged in the indictment and these alone are admitted by the demurrer then no crime of subornation of perjury was

committed, for the reason that the action of the United States commissioner in joining and trying the issue respecting the guilt or innocence of Jake Gronich for violation of the White Slave Traffic Act was clearly extra-judicial.

U. S. v. Cruikshank, 92 U. S. 542; 23 Lawyers Ed. 588.

A preliminary hearing for determining whether an offender against the law should be held to answer for the offense is not a trial. A trial imports the determination of an issue. No issue is determined in a preliminary hearing. The degree of proof required and the nature of the proceedings involved in a preliminary hearing are entirely different from those characterizing a trial.

State v. Belding, 48 Or. 95.

See also *In re Dana*, 68 Fed. 886.

The meaning of the word "issue" has been settled for ages. Sir Matthew Hale says: "When in the course of pleadings they come to a point which is affirmed on one side and denied on the other, they are said to be in issue."

See *White v. Emblem*, 28 S. E. 761, 43 W. Va. 819, and Gould on Pleading (5th ed.) defines an issue as follows:

"An issue in pleading is defined to be a single certain and material point issuing out of the allegations of the parties and consisting regu-

larly of an affirmative and negative," citing Coke on Littleton.

See also Greenleaf on Evidence, Sec. 51.

And in *U. S. v. Greene*, 100 Fed. 941, 944, the court held that there was no "issue" as respects the indictment until the defendant was arraigned and made his plead. Brown, J., in the foregoing case said (p. 944) :

"The objection that this (hearing before commissioner) would be 'trying the issue' is premature. There is no 'issue' as respects the indictment until the defendants are committed, removed and arraigned and plead not guilty."

See cases cited in Vol. IV, Words and Phrases, p. 3793.

So with respect to the meaning of the word "trial" there is no uncertainty. There have been trials at common law dating back to the Norman conquest, trials by ordeal and by battle and by compurgation of witness, and finally trial by jury or by the court. But the term "trial of an issue" has never been applied to a preliminary hearing of one charged with crime. The only purpose and the sole scope of such a proceeding is the ascertainment by the magistrate whether or not there appears to be sufficient basis to justify the magistrate in holding the alleged offender for further investigation by the grand jury or other tribunal. Blackstone defines a "trial" to be "the examination of the matter of fact in issue

in a cause." 3 Blackstone Com. 330. Lord's Oregon Laws defines a trial in Section 113 as follows: "A trial is the judicial examination of the issues between the parties whether they be issues of law or fact."

In *Van Buren v. State*, 91 N. W. 201, Judge Holcomb said: "*A preliminary hearing, however, is in no sense a trial* in which the defendant's rights, in respect to their guilt or innocence, is adjudged, determined or prejudiced, whether a hearing results in the discharge of the accused person or in holding him to appear in the district court to answer the accusation made against him."

Latimer v. State, 53 Neb. 609; 70 Am. St. Rep. 403.

See generally Words & Phrases, Vol. VIII, p. 7099.

The case of *State v. Furlong*, 26 Me. 69, is in point here. Furlong was indicted for perjury alleged to have been committed in giving testimony before a justice of the peace, he being charged with having engaged in a riot. The record showed that there was no trial before the justice but only a preliminary examination. A demurrer to the indictment was interposed for the reason that it appeared on the face thereof that the accused was "*tried*" before the justice of the peace, who was without jurisdiction to *try* such cases, his power being limited to holding the accused. Shipley, J., said:

"It will be perceived that the indictment alleges that Robinson 'was put on trial,' that the

justice 'proceeded to hear and determine the matter of said complaint, that the accused testified falsely to cause the said John G. Robinson to be convicted of the offense charged.' This language is suited to describe proceedings before a magistrate, who has assumed jurisdiction to try and decide finally upon the guilt or innocence of the accused, and not appropriate to describe proceedings when the magistrate assumes only to examine into the guilt or innocence of the accused for the purpose of deciding whether he should be committed or bound over to appear before some other tribunal for trial. The indictment must therefore be considered as describing a case over which the magistrate had assumed jurisdiction for the purpose of a trial for the conviction or acquittal of Robinson.

* * * As the justice in this case had no such jurisdiction as he appears by the indictment to have assumed, he could have no legal authority to administer the oath, and the accused could not on that occasion have committed perjury."

So that if the United States commissioner did what the indictment says that he did, namely, *try* Jake Gronich for violating the white slave traffic act, the proceedings at that trial, so called, were *coram non judice*, for the trial of such offenses as violation of the white slave traffic act come within the jurisdiction of the federal courts and not within the jurisdiction of the commissioners thereof, and it follows for these reasons that the indictment failed to state a cause of action. *If, on the other hand the proceeding before the United States commissioner was not a "trial" but was a preliminary hearing within the province of the commissioner, then there is a clear variance between the indictment and the proof, and Max G. Cohen was indicted for one offense and convicted for another.*

DID THE GOVERNMENT MAKE OUT A PRIMA FACIE CASE?

The next question which, following the order of the assignments of error, we shall discuss is whether or not the Government failed to make out a *prima facie* case.

The defendant Max G. Cohen was charged in the indictment with unlawfully, feloniously and corruptly procuring, advising, obtaining and suborning one Esther Wood to appear as a witness at the trial and hearing of a case before the United States commissioner (the preliminary hearing in the case of the United States v. Jake Gronich for violation of the white slave traffic act), and to give in evidence before the said United States commissioner certain matters material and relevant to the issue in substance and to the effect following, to-wit: That she, the said Esther Wood, had never practiced prostitution in Baker, Oregon, and that she, the said Esther Wood, had never practiced prostitution in Portland, Oregon; and that she, the said Esther Wood, had never practiced prostitution in Denver, Colorado; and that she, the said Esther Wood, had never practiced prostitution at any place in the United States; and that she, the said Esther Wood, did not remember having ever received certain postal cards theretofore sent to her by the said defendant Jake Gronich; and that she, the said Esther Wood, did not remember or recall having written or mailed certain postal cards sent to and received by the defendant Jake Gronich.

The Government, to make out its case against the defendant, called three women as witnesses, named Esther Wood, Violet Woods and Rose Heller. These

women admitted that they were habitual prostitutes and that they were engaged in that business at the time of the trial. So far as material to show that the Government failed to make out a *prima facie* case, the evidence of these three women, set out *in extenso* under the second assignment of error in this brief, summarized is as follows:

Esther Wood testified:

I live at the Levens Hotel in Portland. My occupation is that of a sporting girl, and has been for the last three years, including May 9, 1912. I have also practiced prostitution in Denver and in other places. On May 6th I lived with my husband, Jake Gronich, at the Levens Hotel, having come to Portland about a week before with my husband, and I had lived with him for three years prior to the 6th of May. He was arrested on the 6th of May. At the time I was out with a girl named Rose Heller, and when I came back to the Levens Hotel Mrs. Levens told me that my husband had been arrested *and that the detectives were waiting for me*. So I spent the night at Rose Heller's room at the Oxford Hotel instead of at the Levens Hotel, and I stayed there on the night of May 7th and was arrested on the night of the 8th of May. Mr. Cohen came up to my room at the Oxford Hotel about a quarter after five. When he came in I was in the room with Sadie Parker, Rose Heller and Violet Woods. I was lying on the bed crying. Mr. Cohen asked me if I was married to Jake Gronich. I told him that I was. I told him that I had sported in Portland one day, and he said, "Well, they can't find that out." Sadie Parker then told Mr. Cohen that I had worked for her a little over two weeks, and Mr. Cohen told Sadie that she

would not have to tell that. Then he said, "*They* have to prove that she is a sporting girl." Mr. Cohen then asked me whether I had any telegrams or letters in my trunk. I told him that I had postal cards, and he told me, "Well, if they should show you those just say you don't remember." Mr. Cohen asked me if I came direct from Cleveland here, and I told him that May and I had stopped in Denver and had a sporting house together, and Sadie Parker said that if they scared May she would tell the truth and get me up for perjury, and Mr. Cohen said, "She can deny that she ever sported," and then he said that when "*they*" took me down I should see May, because if May told that she and I had sported together I could say that I did sport but that I wasn't brought here for immoral purposes, and when I sported I did it of my own free will; and if May didn't tell, I could deny that I sported. Then Mr. Cohen advised me not to go away, and said, "Now I will give you my card, and in case *they* do take you call me up no matter what time it is; you call me up when *they* come down to take you." And he wrote down his phone number and gave me his card. I told him I had some postal cards in my trunk from different places where I sported, and he said, "When *they* show you the postal cards then just say that you don't remember." He went away just before six. I was arrested late that same night, about half past ten. I had not been arrested at that time I talked to Mr. Cohen. I retained Mr. Cohen last afternoon as my lawyer, and I paid him nothing for his services. Sadie Parker told him we were down and out; we didn't have any money.

Rose Heller testified that she was in the room at the time when the defendant Max G. Cohen is

claimed by the Government to have suborned Esther Wood, namely, between five and six o'clock on the afternoon on the 7th of May, 1912. So far as material to the contention that the Government failed to make out a *prima facie* case she testified in substance as follows:

I got him (Mr. Cohen) about the night after Jake was arrested (May 6, 1912) for Esther Wood. Mrs. Levens telephoned me and told me to go and get Mr. Cohen. I went to Mr. Cohen's office and left my name with the stenographer. He came down that afternoon to the Oxford, Room 3. When he came into the room there was Sadie Parker, Violet Woods, Esther Wood and myself there. It must have been between four and five o'clock in the afternoon. He stayed about ten or fifteen minutes.

Q. Was anything said by Mr. Cohen as to what Esther Wood should say about her having practiced prostitution?

A. Well, he told her to say that she didn't sport.

Q. Was anything said about May Swindle?

A. No, I didn't hear anything about it.

Practically all the testimony of Violet Woods, the third woman called by the Government as a witness against Max G. Cohen, is copied herein from the bill of exceptions, as her statement of what happened in the room on the night in question appears more accurate and better connected than the testimony of either Esther Wood or Rose Heller.

Violet Woods testified in substance, so far as material, as follows:

I live at the Levens Hotel and my occupation is a sporting girl. I am acquainted with the defendant

Max G. Cohen. I have seen him once, that was the day after Gronich's arrest, either May 6 or 7, 1912. I was in Rose Heller's room before he came in. Rose Heller, Esther Wood and Sadie Parker were there also. It was some time after five o'clock before he arrived. I think he stayed about half an hour. I don't know whether Sadie Parker or Rose Heller called for him. Esther Wood was on the bed crying, and Mr. Cohen said, "What does this mean and what is this about?" Sadie Parker says, "She is the girl of the two fellows that were taken last night." Mr. Cohen said, "Yes, I just came; I was up there and saw them turned over to the marshal," and he said, "They have a colored lawyer." Sadie Parker asked if he could do anything. He asked Esther if she was married and Esther hesitated and she didn't want to say anything, and Sadie Parker said, "Esther, you can tell Max because he is your lawyer and he can see what he can do for you," and Esther didn't want to tell him anything at first, and finally we told her, all of us, "Go ahead, tell Max Cohen; may be he can do something for you." Esther started to tell about her case, and she said, "We came up here with this May and this Joe," and he said, "Yes, I know, I have heard May was married to him," and Esther spoke up and said, "Is this so?" She was kind of surprised, and he said, "Yes, I think she said she was married," and so Sadie Parker handed Esther \$3, and she said I would give her \$5 and we would see if we could not get her away from here. Mr. Cohen said that would not do; "it is no use for her to go away," as we asked him if that would not be best. He said, "No, I wouldn't advise her to go away; if she goes away she might just as well give herself up to the Government." He said, "She has no chance to get away."

And Esther had told him the different places where she had been, and she told him where she had sported one day here. She said about these different places, "What will they do if *they* find out?" and Mr. Cohen said, "Well, have you sported since you have been back?" She said, "Yes, I have sported one day on Third street since I have been back." Sadie Parker then said, "She worked for me last year about Christmas day, something like that," and he said, "*They* won't find that out; you can say you were rooming there," and Sadie Parker said, "She has been at Astoria," and Esther Wood spoke up and told Mr. Cohen that when she was on her way out here she had a house with May in Denver, and she said she was here last year in Baker City, and sported in Astoria and Portland since she came back, and he said, "*They* will have to prove you have been sporting; I don't think *they* can find out." And Esther Wood said, "What will I do if *they* do find out?" He said, "Well, if *they* do find out that May has told you have (been sporting) just find out she has told. *They* might scare you and tell you, but find out for yourself. Then you can say you did it of your own accord, but your husband didn't know anything about it, and if she tells you have been sporting, say that Jake didn't know anything about it," that she had done it of her own free will; and if May didn't tell, Mr. Cohen told her to deny that she had ever been sporting.

That Mr. Cohen asked her if she had any letter or telegrams in her trunk, and she said she didn't know whether she had any letters or telegrams or not, but thought she had some postals that Jake sent her, and that they were in Jake's handwriting, and Mr. Cohen said, "Well, if *they* show you those

postals you can say you don't remember anything about them; you don't remember them."

On cross examination Violet Woods testified, so far as material, as follows:

There were five of us in the room, including Mr. Cohen, and all the conversation was held openly in the presence of everybody. Mr. Cohen asked Esther first how long she had been back, and she said just a few days, and he asked her had she been sporting since she came back, and Esther didn't want to say anything. After that Esther started to tell him that she came out here with May and Joe Albin. I told Mr. Cohen I was down in Astoria and Esther was sporting there, and Mr. Cohen said, "Well, they can't find that out; they will have to prove it." And Esther asked what she should do if May told that they had had a house in Denver, and Mr. Cohen said that she should find out first that May had told, and if May had told, that she could say that she did it without her husband's knowing it and of her own free will; and that if May didn't tell, she could deny she had been sporting. He told her twice she could deny it. At that time Esther Wood had not been arrested and nobody had seen her.

The defendant pleaded not guilty and denied the commission of the crime charged or any intent to commit such crime.

The first fact to be pointed out in connection with this testimony is that at the time this conversation took place in the Oxford Hotel between the defendant Max G. Cohen and Esther Wood, with the other women present, Esther Wood *had not been arrested*, and she had no knowledge that she would

be arrested, except that from her own testimony it appears that Mrs. Levens told her that the detectives had been after her. There is nothing in the evidence to show that the defendant Max G. Cohen knew when the preliminary hearing of Jake Gronich would be held, whether immediately or at some remote time in the future, or that at the time of said conversation he knew that Esther Wood would be compelled to testify against her husband, Gronich. There is no evidence at all in the testimony of Esther Wood, Violet Woods or Rose Heller that Max G. Cohen either directly or indirectly advised Esther Wood to *give any testimony*, false or otherwise, in *any judicial proceedings*; and outside of judicial proceedings Esther Wood was under no obligation to tell the detectives anything. She had the right to keep her mouth shut. She also had the right to tell the detectives anything she pleased, false or true, regarding her relations with Jake Gronich as long as she was not under oath. If Max G. Cohen did indeed advise Esther Wood as she said he advised her, the natural, if not inevitable, conclusion from the testimony of the Government's witnesses as to the conversation at the Oxford Hotel that he meant and intended that she should not incriminate herself when talking to the detectives, who were after her, as appears from her own testimony; for the only persons who had sought to interrogate Esther Wood up to this time were the detectives who had called at the Levens Hotel.

In order to constitute the crime of subornation of perjury the person charged with the subornation *must have had in mind some particular tribunal or proceeding wherein he intended that the perjury should be committed*; and if there are no proceed-

ings instituted of which the accused has knowledge at the time the crime of subornation of perjury is claimed to have been committed, and the language claimed to constitute subornation of perjury is equivocal and may have to do with proceedings beyond the pale of the law of perjury, as well as proceedings wherein the crime of perjury may be committed, in such case there are no facts upon which a charge of the subornation of perjury can be predicated. Government inquisitors have no right to compel witnesses or persons accused of crime to give them information, and if the advice of an attorney relates or may as reasonably relate to such interviews and inquisitions as to judicial proceedings, there is no subornation of perjury.

In the trial of the defendant herein there was direct evidence given by Esther Wood and her associates of the talk had with her in the Oxford Hotel on the afternoon of May 7, 1912; but there is no direct evidence of any conversations taking place in that room on that occasion to the effect that Esther Wood should give *any evidence at a judicial hearing*; and there is no circumstance in evidence showing that the defendant intended in his conversation with Esther Wood at the Oxford Hotel that she should give any *testimony* anywhere. According to all the testimony given by Esther Wood and her associates, all he did, at the Oxford Hotel, on the afternoon of May 7, 1912, was to advise Esther Wood what to say. But *when*, or to *whom*, or *wherein* she was to say what she claims she was told to say,—as to all this, the evidence is silent except as to Esther Wood's own deductions and opinion—if the quoted answers may be so termed — that the conversation she had with the defendant on the aforesaid occasion

at the Oxford Hotel constituted advice to commit perjury herself before the United States Commissioner at the preliminary hearing of Jake Gronich.

See, also, in connection with the question of corroboration in a case of subornation of perjury, *Boren v. U. S.*, 144 Fed. 80, and *People v. Erans*, 40 N. Y. 1.

See more particularly State v. Howard 38 S. 2 908
State v. Joaquin 69 Pac 218 *Nicholson v. State*
 25 S. 360

MATERIALITY OF THE TESTIMONY.

A fatal error was committed by the trial court in allowing the defendant to be convicted of subornation of perjury, in that the testimony claimed to have been falsely given at the hearing before U. S. Commissioner Cannon was not shown to have been *material* to the issue involved at that hearing. To prove the crime of perjury, or subornation of perjury, it is necessary not only to show that there was a false statement of fact made under oath, but the prosecution must go farther and show the materiality of the false statement to the issue as well, and this proof cannot be supplied, either by opinion evidence or by presumption.

McClelland v. People, 113 Pac. 640.

Bledsoe v. State, 42 S. W. 899.

Brown v. State, 36 S. W. 705.

Commonwealth v. Pollard, 12 Metc. 225-229.

Fletcher v. State, 123 Pac. 80.

Wilde v. State, 123 Pac. 85.

People v. Teale, 196 N. Y. 372; 89 N. E. 1086;
 25 L. R. A. (U. S.), 120.

U. S. v. Howard, 132 Fed. 325.

Rich v. U. S., 33 Pac. 804.

Lawrence v. State, 2 Texas App. 479.

U. S. v. Shinn, 14 Fed. 447.

Government's Exhibit 3, which is attached to the Bill of Exceptions, sets forth the proceedings before U. S. Commissioner Cannon at the preliminary hearing of Jake Gronich for violation of the White Slave Traffic Act. Esther Wood was called as a witness, and after considerable show of reluctance upon her part, testified that she was the wife of Jake Gronich, and denied that she had practiced prostitution in Baker, Oregon, Denver, Colorado, or in any other place in the United States. At that hearing she testified that she did not remember having received or sent certain postal cards to Jake Gronich. This evidence was entirely immaterial, for there was no evidence introduced at the preliminary hearing of Jake Gronich before U. S. Commissioner Cannon for violation of the White Slave Traffic Act, of the *corpus delicti*. The question properly before U. S. Commissioner Cannon at the aforesaid hearing (despite the allegations of the indictment) was to determine whether or not there was probable cause to hold Jake Gronich for violation of the White Slave Traffic Act in bringing Esther Wood to this state for the purpose of prostitution. It was not enough for the Government, in order to make out a case of probable cause, to show that Jake Gronich brought Esther Wood to this state; neither was it enough to show that Esther Wood was or was not a prostitute in other states and giving full effect to everything in Government's Exhibit 3, this was all that was adduced. Assuming that it was true that Jake Gronich brought Esther Wood to Portland, Oregon, and bought her ticket,

and assuming that it was true that she practiced prostitution in other states, and assuming that it was true that certain postal cards were exchanged between them (none of which refers to prostitution or evidence any intention to violate the White Slave Traffic Act, the Governemnt would have to go still farther and supply the missing link, and prove the *corpus delicti* by introducing some evidence that this woman was brought to the State of Oregon by Jake Gronich for the *purpose of prostitution*. There was a hiatus in the Government's case at the preliminary hearing because of the omission of any evidence tending to prove the importation of Esther Wood by Jake Gronich for the purpose of prostitution. All that the record shows is the complaint against Jake Gronich for violation of the White Slave Traffic Act, and the testimony of Esther Wood; and there was no evidence introduced of the purpose for which Jake Gronich brought Esther Wood to this state. It is not enough that the evidence of Esther Wood, as contained in Exhibit 3, relative to her prostitution in other states and to the postal cards, might have been relevant under some circumstances, or might have been material if other evidence showing the purpose of Jake Gronich in bringing Esther Wood to this state had not been introduced. The Government was under the necessity of showing the facts constituting the materiality of the alleged false oath of Esther Wood at the preliminary hearing before U. S. Commissioner Cannon. Before probable cause of a crime can be established, some evidence of that crime must be produced. Merely leading up to a possible crime is not evidence of the commission of that crime unless other evidence is introduced to show that such a crime has actually been committed. There is a dif-

ference between the degrees of evidence and no evidence at all.

Jake Gronich might have brought Esther Wood to Portland for any purpose, good or bad, even though she were a prostitute, and some evidence of this purpose had to be introduced beyond the mere fact of her former prostitution.

The White Slave Traffic Act penalizes interstate importation of females for immoral purposes. A man may, if he desires, marry a prostitute or a lewd woman, and import her into any state in the Union. The importation does not constitute the crime; it is the importation coupled with the intention to use the woman for the purposes of prostitution, or in violation of the accepted moral code, which constitutes the crime, and brings the transaction within the purview of the White Slavery Act.

The evidence in this case is undisputed that Esther Wood was the wife of Jake Gronich, and there being no evidence to the contrary at the hearing before Commissioner Cannon, the presumption of innocence requires the inference that Jake Gronich brought his wife to Portland for a proper purpose. He had a right to bring his wife here, and it was for the Government to introduce evidence at the preliminary hearing to show the criminal intent if any existed.

Mere prior prostitution alone could not establish that intent in view of the marriage between Jake Gronich and Esther Wood. It is possible that a woman engaged in prostitution might reform her ways and live with a man in lawful wedlock, and no presumption could bring the mere carrying of such a woman from one state to another within the pro-

visions of the White Slave Act. The presumption under these circumstances, in the absence of any evidence to the contrary, would be that Jake Gronich brought Esther Wood to Portland for a proper purpose.

See *State v. Belding*, 43 Or. 98, as to the degree of proof necessary to hold a man accused of crime in a preliminary hearing.

A case squarely in point with the present one on this phase is *McClelland v. Pcope*, 113 Pac. 640. It appeared in that case that a girl named Nellie Hart was charged in the County Court with being a delinquent child under the statute, and that the defendant, McClelland, suggested that the girl be sent out of the jurisdiction of the court in order to avoid the publicity of a trial. And it further appears that with the aid of the defendant this plan was carried out, and he was thereafter formally charged in the County Court with contributing to the delinquency of the girl. At the trial in the County Court one Crowder was called as a witness, and testified that McClelland had nothing to do with the departure of the girl who had been charged with delinquency, but that he, Crowder, had assisted in her departure. McClelland was indicted for subornation of perjury because it was alleged that he induced Crowder to make this false statement at the hearing before the County Court. No evidence had been introduced in the County Court showing that the defendant, McClelland, had contributed to the delinquency of the girl in question, and his attorneys claimed in the trial for subornation of perjury that the procuring of Crowder to swear falsely that he assisted the girl in going away was not relevant to the issue at the trial in the County Court. The Supreme Court of

the State of Colorado agreed with this contention of the defendant's attorneys and reversed the case, the court saying, through White, J.:

"It is equally essential upon the trial to prove the facts showing the materiality of the false statements or testimony. *The proof* should show how and wherein the matter upon which the perjury is assigned was material to the issue or point in question. * * * The evidence constituting the alleged perjury must have been material to the matter *then* being investigated, or the point in question before the court, and it devolves upon the people, upon trial, to show its materiality. While the test of materiality does not require the false testimony to be directly pertinent to the main issue or point in question, it does require that it have a legitimate tendency to prove or disprove some material fact in the chain of evidence; that is, that it be directly or circumstantially material. It is equally true that its materiality must be established by evidence either direct or circumstantial, and cannot be left to presumption. * * * The falsity of Crowder's testimony and his knowledge thereof may be conceded, yet there is an entire absence of evidence showing or tending to show the materiality of the alleged false matter testified to by him upon the issue or point in question in the case in the County Court wherein such testimony was given."

See, also, *Fletcher v. State*, 123 Pac. 80.

Wilde v. State, 123 Pac. 85.

The same rule was recognized in *Ruch v. U. S.*, 33 Pac. 804. The court in that case said in regard to a state of facts similar to those in this case:

“On the trial of the appellant in the court below, the testimony of the appellant given before the Registrar and Receiver of the local land office, on the trial of the land contest, was offered in evidence to the court and jury, in which it appeared that the appellant swore that on the 21st day of April, 1899, in the afternoon of that day, he saw Walter Sheppard at Borrow’s Crossing of the South Canadian River, and saw him ride into and across said river and thence into the Oklahoma country; and it is this evidence that is alleged in the indictment to have been material on the trial of the land contest and on which the perjury is assigned; and it may be conceded that this testimony was false, but we fail to find in the record which purports to give all the testimony of the trial below, any proof that it was in any manner directly or indirectly, proximately or remotely material to the issue tried and determined by the Registrar and Receiver of the local land office in the land contest. * * * As there is no sufficient proof on the trial below of the materiality of the alleged false testimony of appellant, the verdict of the jury was not supported by the evidence and was contrary to law, and the court erred in overruling appellant’s motion for a new trial.”

In the case of *Bledsoe v. State*, 42 S. W. 899, it appears that one St. John was tried for the crime of burglary committed by breaking into a drug store. Bledsoe, the defendant, swore that he examined a safe in the drug store which the said St. John was charged with having broken into and that the door of the safe had been bored and picked, and that the hole was one-half inch in diameter. Bledsoe was indicted for perjury, the indictment charging that these statements in regard to the hole being bored in the safe door were false. He was convicted of per-

jury in the lower court, but the Supreme Court reversed the decision on the ground that it had not been shown that this evidence was material to any issue involved in the trial of St. John for the alleged burglary. The court said:

“The only evidence tending to show that this evidence was material to the issue raised on the trial of St. John for having broken and entered the storehouse of the said company, is that it was proved by the witnesses of the state in that trial that at the time of his arrest St. John had in his possession certain drills and bits three-eighths inch in diameter. The theory of the state was that the hole in the safe was made with these drills or bits, and the testimony of Blersoe tended to refute and contradict this theory, for he testified that the hole was larger than the drills or bits. But it is not shown that the safe was in the storehouse or that it was bored into and broken into on the night of the burglary or about that time. * * * The fact that St. John was charged with having broken into safe and had drills that fitted or did not fit the hole in the safe, had no bearing upon his guilt or innocence of the charge of breaking and entering a storehouse, for which he was being tried, unless there be evidence connecting the boring of the safe with the entering of the storehouse. Until that be shown, the evidence concerning the safe is not shown to be material, but you cannot convict a man for one crime by showing that he is guilty of another and different crime.”

See *People v. Teal*, 196 N. Y. 372; 89 N. E. 1085.

See, also, the same case reported in 25 L. R. A. (N. S.), 120, and note.

See, also, *Commonwealth v. Pollard*, 12 Metc. 225, 229.

U. S. v. Shinn, 14 Fed. 447.

Lawrence v. State, 2 Texas App. 479.

U. S. v. Howard, 132 Fed. 325.

Brown v. State, 36 So. 705.

And it is not enough to introduce in evidence the record of the case in which it alleged the false oath was taken. The Government must go farther and introduce evidence showing the materiality of the alleged perjured testimony to the issue involved.

McClelland v. People, 113 Pac. 640, and cases *supra*.

In the instant case not a scintilla of evidence was introduced to show the materiality of the alleged perjured testimony, nor could the fact of materiality be established by the mere opinion of witnesses.

Washington v. State, 5 S. W. 119.

Foster v. State, 22 S. W. 21.

PROHIBITED TESTIMONY — NOT SUBJECT OF PERJURY.

A most serious and fatal error was committed by the Government in compelling Esther Wood to testify against her husband, Jake Gronich, at the pre-

liminary hearing before U. S. Commissioner Cannon, on or about the 9th day of May, 1912, at which time the alleged perjured and suborned testimony was charged as having been given. (See Assignments of Error, Nos. 6 and 7.) The U. S. Commissioner, as well as the Deputy U. S. District Attorney, Maguire, had full knowledge that Esther Wood was the wife of Jake Gronich, as appears in Government Exhibit 3, which is attached to the Bill of Exceptions, and the perjury charged in the indictment to have been suborned was perjury alleged in the indictment to have been committed at the "trial" of Jake Gronich before the U. S. Commissioner.

The rule of practice in the Federal courts for the trial of criminal cases is laid down by Chief Justice Taney in the leading case of *U. S. v. Reid*, reported in 12 Howard, 362, and also in Lawyers' Ed., Supreme Court Records, Vol. 13, 1023. In that case Chief Justice Taney said:

"All the rules of evidence in criminal cases are the rules which were in force in the respective states when the judiciary act of 1789 was passed. Congress may certainly change it whenever they think proper within the limits prescribed by the Constitution. But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases."

And in the case of *Logan v. U. S.*, 144 U. S. 263, 36 Lawyers' Ed., 429, at p. 443, Mr. Justice Gray laid down the rule as follows:

"For the reasons above stated, the provision of Sec. 868 of the Revised Statutes that 'the laws of the state in which the court is held shall be

the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and equity' and admittedly has no application to criminal trials, and therefore the competency of witnesses in criminal trials in courts of the United States held within the State of Texas is not governed by the statute of the state which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute, and at the time of the admission of Texas into the Union, as a state."

While the foregoing rule of practice is still in force in Federal courts, Congress has "certainly" (to use the language of Chief Justice Taney) *changed the practice in preliminary hearings of persons accused of crimes against the United States by the enactment of Sec. 1014 of the Revised Statutes of the United States*. That section provides that any offender against the laws of the United States may be arrested, imprisoned or bailed, as the case may be, "agreeably to the usual mode of process against offenders in such state." And this means that in all hearings for the arrest and commitment of offenders against the laws of the United States the then practice of the state court shall be followed.

See *U. S. v. Sauer*, 73 Fed. 671.

U. S. v. Garcelon, 82 Fed. 611.

U. S. v. Rundlett, 2 Curt. (U. S.), 41.

U. S. v. Martin, 17 Fed. 150.

Marvin v. U. S. 44 Fed. 405.

U. S. v. Horton, 2 Dillon (U. S.), 94.

At the time Jake Gronich was arrested for violation of the White Slave Traffic Act, Chapter XXI of Lord's Oregon Laws was in full force and effect. This chapter sets forth the procedure in preliminary hearings of persons charged with crime. The procedure contained in this Chapter XXI of Lord's Oregon Laws would be binding upon the U. S. Commissioner at the preliminary hearing to determine whether or not Jake Gronich should be held for violation of the White Slave Traffic Act.

See *U. S. v. Garcelon*, 82 Fed. 611.

And the laws of evidence applicable to the trial of criminal cases as well as to preliminary hearings would also be binding upon the said commissioner at the said hearing. At the time of the hearing of Jake Gronich for his alleged violation of the White Slave Traffic Act, Sec. 1535 of Lord's Oregon Laws was in full force and effect. It reads as follows:

“In all criminal actions where the husband is the party accused, the wife shall be a competent witness, and when the wife is the party accused, the husband shall be a competent witness; *but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such cases unless by consent of both of them*; provided, that in all cases of personal violence upon either by the other, the injured husband or wife shall be allowed to testify against the other.”

The rule of evidence contained in Sec. 733 of Lord's Oregon Laws, does not apply in criminal proceedings, so that Sec. 1535 governs the trial of crim-

inal actions in the State of Oregon, so far as the testimony of husband and wife is concerned.

See *State v. McCrath*, 35 Or. 1095; 57 Pac. 321.

State v. Luper, 49 Or. 607; 91 Pac. 444.

State v. Luper, 95 Pac. 811.

Basset v. U. S. 137 U. S. 496; 34 Lawyer's Ed. 763.

In re Dana, 68 Fed. 886, at p. 893, Brown, J., said: "The rules of procedure to be followed under Sec. 1014 are those in force in the state at the time and place of the * * * proceeding."

It follows, then, that as the U. S. Commissioner in the hearing of Jake Gronich for violation of the White Slave Traffic Act was bound to follow the law of evidence as to the testimony of husband and wife in criminal cases, as set forth in Sec. 1535 L. O. L., he *exceeded his powers*, and went beyond any authority conferred upon him by law, in *compelling or even allowing* Esther Wood to give evidence at the said hearing against her husband, Jake Gronich. It is evident that Esther Wood was an unwilling witness, but even though she were a willing witness, her testimony could not have been allowed according to the statute, unless there was a waiver joined in by herself and her husband; and no such waiver appears. The evidence given by Esther Wood at the hearing that she did not practice prostitution at other places, and that she had no remembrance of the exchange of postal cards with Jake Gronich, was evidence which was absolutely *prohibited* by law, and therefore could form *no basis for a charge of*

perjury or subornation of perjury, even though the testimony given was false.

It is also, of course, axiomatic that *evidence which is prohibited cannot be material*, and inasmuch as it appears that the evidence of Esther Wood was prohibited at the hearing in question, of course it cannot be material, and the prosecution failed because the requirement that the alleged perjured testimony must be material was not established in this as well as in the respects previously argued under the head of "Materiality of the Testimony."

In this connection the case of *U. S. v. Grottkau*, 30 Fed. 672, is instructive. The defendant in the Grottkau case was indicted for perjury, the indictment charging him with falsely swearing that he had resided within the State of Wisconsin for one year next preceding his application for citizenship. Sec. 2165 of the Revised Statutes, relating to the subject of naturalization, in the closing paragraph thereof, provides, among other things, "That the oath of the applicant shall be in no case allowed to prove his residence."

Federal Judge Dryer, in discharging the prisoner, said:

"Then when we come to the third subdivision, we find that its language is not that he shall declare on oath certain facts in regard to his residence, but that it shall be made to appear to the satisfaction of the court admitting such alien that he had resided within the United States five years at least, and within the state or territory where such court is at the time held one year at least. And the closing sentence in this section declares, without qualification, that the oath of the applicant shall in no case be al-

lowed to prove his residence. This is, in effect, a prohibitory clause forbidding the taking of the oath of the applicant himself as proof of his residence, the evident object of the law being to require other proof than that of the oath of the applicant, upon the subject. This being the statute provision as enacted by Congress, we have to apply it in this case. In the interpretation of the statute, the familiar and elementary principle that to constitute perjury the oath or affirmation must be material, or, as it is stated in the opinion of the court in the case of *Silver v. State*, 17 Or. 368, it must be required by, or have some effect in law. Further, it is elementary that perjury cannot be assigned of an oath that is extra judicial."

The same principle was recognized in the case of *U. S. v. Bell*, 81 Fed. 830.

See, also, *State v. Trask*, 42 Vt. 152.

State v. Furlong, 26 Me. 69.

Collins v. State, 78 Ala. 433.

People v. Fitmus, 102 Mich. 318.

U. S. v. Bedgood, 49 Fed. 54.

U. S. v. Law, 50 Fed. 915.

U. S. v. Howard, 37 Fed. 666.

An indictment based solely on the testimony of wife against her husband was held invalid in *People v. Briggs*, 60 How. p. 217; also in *People v. Moore*, 65 How. p. 177. See *People v. Beadeck*, 102 N. E. 243.

And in this connection it is well to note the distinction which exists between an incompetent witness swearing falsely in a proceeding wherein his in-

competency can be waived and his testimony in a case wherein he is *prohibited* from testifying in any event.

See cases cited in *U. S. v. Grottkau*, 30 Fed. 672.

The only exception contained in Section 1535, Lord's Oregon Laws, to the general rule that the husband or wife cannot testify against the other in criminal actions, arises in case there is personal violence used by the husband or wife against the other. And "personal violence" under the statute means direct, forcible, personal violence upon the body of the injured spouse, as distinguished from injury to the marriage relation. The words "personal violence" are to be construed according to the ordinary and commonly understood meaning of the words as used by English speaking people. "Violence" imports active force, and the adjective "personal" used to qualify its meaning in Section 1535, L. O. L., imports that the violence shall be to the person, as distinguished from his abstract or intangible rights.

See *Basset v. U. S.*, 137 U. S. 496; 34 L. Ed. 762.

Also *State v. Woodrow*, 52 S. E. 545; 2 L. R. A. (N. S.) 862.

In *People v. Curiale*, 137 Cal. 538; 70 Pac. 468, the defendant was charged with statutory rape. The statute provided that a husband or wife could testify against the other in cases of "criminal violence upon one by the other," and the attorney general

urged that this case fell within the exception. The Supreme Court of California, speaking through Judge Cooper, said:

“The crime charged was upon the person of Isabella Petruccelli, and committed before she became the wife of the defendant. Criminal violence upon one by the other *means what it says*; criminal violence upon the wife by the husband, or criminal violence upon the husband by the wife. * * * If the crime charged should be regarded with reference to the person of the wife regardless of the question as to whether she was the wife at the time of its commission, still we do not think it is a case of criminal violence under the statute. The act of having sexual intercourse with a female under the age of sixteen, with her consent, is not an act of criminal violence. It is a crime, because made so by statute.”

See also *Miller v. State*, 40 S. W. 313.

Basset v. U. S., 137 U. S. 496; 34 L. Ed. 762.

State v. Burt, 17 S. D. 7; 94 N. W. 409; 106 Am. State Repts. 759 and note.

Brock v. State, 71 S. W. 20; 100 Am. State Repts. 859.

People v. Quanstrom, 93 Mich. 259; 53 N. W. 167; 16 L. R. A. 725.

Commonwealth v. Sapp, 901 Kan. 280; 29 Am. St. Rept. 405.

Stein v. Bowman, 13 Peters, 209; 10 L. Ed. 129.

The statutes of some states allow husband and wife to testify against each other in criminal cases,

when the offense is committed by one spouse against the other without limiting the admissibility to cases of "personal violence." In construing such statutes, the courts have allowed evidence of wrongs by one spouse against the other which were in their nature wrongs against the marital relation, rather than wrongs against the spouse by way of "personal violence."

State v. Chambers, 87 Ia. 1; 53 N. W. 1090; 43 Am. State Reports, 349.

Dill v. People, 19 Colo. 477; 41 Am. St. Rep. 260; 36 Pac. 232.

In the case of the *State v. Chambers, supra*, the Supreme Court of that state makes a distinction between statutes which give the injured spouse the right to testify in cases of "personal violence," as distinguished from statutes which give the injured spouse the right to testify in cases where one spouse commits an offense against the other spouse.

Judge Given, in the above entitled case, said:

"In *Basset v. U. S.*, 137 U. S. 496, a prosecution for polygamy, it was held under the code of criminal procedure of Utah that the offense charged was not such a wrong against the wife as to render her testimony admissible. The exception contained in that code is where the testimony is given with the consent of both 'in cases of criminal violence upon one by the other.' It will be noted that the exceptions in these statutes apply to personal wrong or injury, while under ours they apply to all 'criminal prosecutions for a crime committed by one

against the other.' There are many crimes other than against the person which one may commit against the other."

This case distinguishes cases of "personal violence" from other offenses against the wife or husband, as the case may be.

See, also, *Dill v. People*, 19 Colo. 477; 41 Am. St. Rep. 260.

In *Basset v. U. S.*, 137 U. S. 496, which is a leading case on the subject, the husband was indicted for polygamy, and his original wife appeared against him as a witness. The code in the State of Utah provided that neither husband nor wife could testify against each other "except with the consent of both or in cases of criminal violence upon one by the other." In reversing the judgment of the Supreme Court of Utah, Mr. Justice Brewer said:

"This precise question has never been before this court, but the common law rule has been noticed and commented on in *Stein v. Bowman*, 13 Peters, 209-222, in which Mr. Justice McClean used this language: 'It is, however, admitted in all the cases that the wife is not competent except in cases of violence upon her person, directly to incriminate her husband or to disclose things that she has learned from him in their confidential intercourse. * * *' (Is polygamy such a crime of criminal violence against wife?) That it is no wrong upon her person is conceded, and the common law exception to the silence imposed upon the lips of husband and wife is only broken, as we have noticed, in cases of assault upon one by the other. That there is

humiliation and outrage upon her is evident. If that is the test, what limit is imposed? Is the wife not humiliated? Is not her respect and love for her husband outraged and betrayed when he forgets his integrity as a man, and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder or robbery or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and as the statute speaks of crimes against her, it is simply an affirmative of the old, familiar and just common law rule. We conclude, therefore, that under this statute the wife was an incompetent witness against her husband."

The only case which we have been able to find in opposition to the foregoing authorities is that of *U. S. v. Rispole*, 189 Fed. 271, a decision of the District Court for Pennsylvania, where the wife was allowed to testify against the husband in a case where he was charged with violating the White Slave Traffic Act. This case arose in the Pennsylvania District. The argument of the learned U. S. District Attorney of that district is set forth in full in the report of the case probably to strengthen and show the reasons for the opinion of the court, which is extraordinarily short, considering the departure of this case from the well settled rules of law, as laid down in the foregoing cases. The famous Lord Audley's case, in the House of Lords in 1613, reported in

3 Howell's State Trials, p. 401, is referred to in that case. Lord Audley, it will be recalled, procured the commission of a rape upon his wife, and of course this was an act of hideous personal violence, and to allow the wife to testify under such circumstances would be no exception to the general rule laid down in all the foregoing cases; and if a case should arise wherein a husband should force his wife, by means of physical violence, to live a life of prostitution, this act of the husband might well be construed as an act of personal violence.

But if a moral degenerate should marry a prostitute, and should aid and assist her in plying her trade, and should act the part of pimp or procurer, under such circumstances it cannot be said that the degenerate husband, vile though his crime may be, is committing any act of personal violence upon his prostitute wife, for she consents to the act, and there is no question of personal violence involved. If the husband should send his wife out as a shoplifter to support him, that act would not be an act of physical violence against the wife unless he used actual force in sending her out. If she went out of her own free will, it could not be said that there was any physical violence in the case, for the reason that she consented. *Velenti non fit injuria*. Lord Herschell, in *Smith v. Baker*, 60 L. J. 2, p. 70, said: "One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong." And to the same effect see

Goldnamer v. O'Brien, 33 S. W. 831.

People v. Cundle, 137 Cal. 538; 70 Pac. 470.

Miller v. State, 40 S. W. 313.

It is submitted, therefore, that the Pennsylvania court in reaching such a conclusion betrayed a gross misconception of the clear distinction between "personal violence" and willing compliance.

On this general proposition we take the liberty of citing the views of a non-legal authority on the sociological phase, since they are instructive, and we submit pertinent, in that it is a canon of construction that statutory words are to be given their ordinary signification. We quote an interview with A. W. Elliott, president of the Southern Rescue Mission and editor of the *Young Woman's Magazine*, which appeared in the "*Oregonian*" of November 18, 1913, published in Portland, Oregon. His statement is as follows:

"We frankly say there never was a joke of more huge proportions perpetrated upon the American public than this white slave joke. I surely do not believe that there are a dozen girls in America today that are in houses of ill-fame that could not walk out if they wanted to. They love that kind of life and will scoff at the reformer and even kick him if he does not get out when asked to.

"I could go into detail, writing hundreds of pages of my various efforts to redeem them, but it would be useless waste of time; it is only necessary to tell you that women of the underworld will not reform, and there is positively no use in wasting your money on them. I have positively entered at least two thousand houses of ill-repute and have talked face to face with possibly fifteen thousand of these women, and I pledge you truthfully that I know them just as you know your own little children, and I do not hesitate to tell you that they are wedded to their

ways and that they laugh at and make fun of those who try to help them."

Whether there is personal violence in any case is a question of fact. Esther Wood, in the preliminary hearing before U. S. Commissioner Cannon, when her husband, Jake Gronich, was the defendant charged with violation of the White Slave Traffic Act, testified to no personal violence committed upon her by her husband; and even if she had testified that Jake Gronich had transported her to the State of Oregon for the purpose of prostitution, no "personal violence" could be predicated on such an act, certainly in the absence of duress on his part.

For this reason we believe that the case of *U. S. v. Rispole, supra*, will not be followed by this court, or by any court which makes a study of the law as it is. If Congress wishes to allow married prostitutes to testify against their husbands under such circumstances, all that is necessary to do is to amend the White Slave Traffic Act. But until Congress takes action upon the matter, the courts should follow the law according to its principles as it has been laid down. See in this connection

Goldnamer v. O'Brien, 33 S. W. 831.

Also *State v. Moore*, 45 Tex. Cr. App. 234;
2 Am. & Eng. Ann. Cases, 878.

It follows that Esther Wood, being a prostitute from choice, and there being no evidence of physical violence upon her, she was *prohibited* by Sec. 1535, Lord's Oregon Laws, from giving testimony against her husband, Jake Gronich, at the preliminary hear-

ing before U. S. Commissioner Cannon for violation of the White Slave Traffic Act; and any evidence given by her at the said hearing against her husband, even though false, the same being *extra judicial* and of no legal effect, could not be used as evidence to prove a charge of perjury or of subornation thereof.

EFFECT OF COERCION OF WITNESS.

(See Assignment of Error No. 8.)

It appears from Government Exhibit 3 that Esther Wood was an unwilling witness. At the outset of her examination she refused to testify, and it was only after repeated threats of holding her for contempt that she was induced to give evidence at the hearing. It is obvious from a reading of this exhibit that coercion was used, as is evidenced by the following extract:

“Mr. Cannon (speaking to Esther Wood): You understand you can be punished for your attitude?

A. Yes, sir.

Q. Do you prefer to be punished and kept in jail rather than testify?

A. Yes, sir.

Q. Very well, then, Miss Wood, this is probably what will happen to you unless you do testify. You will probably have to go to jail for an indefinite time, if you prefer to do that rather than answer simple questions.

* * * * *

Mr. Maguire: Q. What is your name?

A. I refuse to talk. I told you once.

Q. How old are you? Do you refuse to answer that? Where have you lived in the last two years? Do you refuse to answer that question also?

A. Yes, sir.

Q. On what ground?

Mr. Cannon: I don't think there is any use in pursuing this hearing any further. I think I will—

Mr. Stephenson: I would like permission, if Your Honor please, to ask the witness one question.

Mr. Maguire: If the court please, I object to that. The Government, I think, has subpoenaed this witness, and as she has refused to testify, there is no chance for any cross-examination.

Mr. Cannon: I presume that is technically correct, although I don't care to put an incompetent witness in jail, if she is, as a matter of fact, incompetent.

* * * * *

Q. Where have you lived in the last two or three years?

A. I refuse to answer any further. I will answer all questions as soon as I have seen my attorney. I haven't talked to him. I was very ill. I didn't talk to him.

Mr. Maguire: Her attorney has been notified of the time of the hearing and he has already told Mr. Pray and myself over the telephone that he had advised her to tell the truth about the matter, so there is no excuse for her attitude.

Mr. Cannon: If she is incompetent, there is no use for me to commit her.

Mr. Maguire: She is not incompetent. I believe

counsel's position is this: that she is incompetent to testify against this defendant because there may be a marriage relation claimed between them.

Mr. Cannon: I understand that is the rule.

Mr. Maguire: I think, if the court please, that I will ask for a continuance of this case pending some decision one way or the other as to her being competent, and it may be quite likely she will change her mind when she understands more fully.

Mr. Cannon: I think she will. I will continue the case and you can call it up at any time you see fit.

Mr. Cannon: I will do this. I will take the case under advisement, and this witness will be committed to the county jail pending a decision in the matter, and I don't know just when I will be able to decide it, and her bond will be fixed at \$2,500."

Mr. Maguire was Deputy United States District Attorney.

Thereafter the witness, Esther Wood, gave her testimony at the preliminary hearing, as appears from Government Exhibit 3.

All through the testimony contained in Government's Exhibit 3 the witness was browbeaten and threatened. As we have already pointed out, the Government had no authority to examine this witness at all, or require her to testify against her husband, neither had it any right to compel her to incriminate herself or give testimony which might incriminate her. For her to practice prostitution, even at the instigation of her husband, would constitute, under the laws of most of the states, the crime of adultery, and she had the right to be silent upon this matter if she wished.

In the case of *U. S. v. Bell*, 81 Fed. 830, the rule is laid down by Judge Hammond that when a witness has the right of refusing to give evidence, under the Fifth Amendment to the Constitution of the United States which prohibits forced self-incrimination, compelling testimony, even though false, is not sufficient ground to sustain a charge of perjury or of subornation of perjury.

See *Brown v. Walker*, 161 U. S. 591.

Pipes v. State, 9 S. W. 614.

Wigmore on Evidence, Sec. 2251.

CONCLUSION.

This case presents phases somewhat unusual. The defendant is a practicing attorney in Portland, Oregon. He was called from his office to see this woman, Esther Wood, at the Oxford Hotel. He had never seen her before, and received no compensation from her. He had no motive or purpose in advising her to commit perjury. He was not interested in, nor was he the attorney for, her husband. He innocently walked into a trap when he went into room 3 of the Oxford Hotel on the afternoon of May 7, 1912, between the hours of five and six. He was alone. The prostitutes numbered four. One of them, Esther Wood, was interested. She was the only one who had any interest in Jake Gronich, and evidently, after her arrest and incarceration for seven months, she had some interest in her own fate, as she had been indicted for perjury, alleged to have been committed at the preliminary hearing before the Hon.

U. S. Commissioner. With two of the prostitutes to aid her, it was not strange that she should make Max G. Cohen the scapegoat and load her sin upon him. The following questions and answers in the cross-examination of Esther Wood by Mr. Ralph E. Moody may throw a sidelight on some things that might influence her to save herself:

“Q. Well, and how was it that you happened to tell Mr. Maguire that Mr. Cohen told you to do this?

A. Why, because it is the truth.

Q. I know; but what occasioned you to tell Mr. Maguire that?

A. Well, he told me that if I told him—he told me that they were going to sentence me to Lansing—to Kansas—he told me I was to be sentenced to Lansing, Kansas,—to the penitentiary, and I said, ‘Yes, can I plead guilty right away?’ and he said, ‘You have to wait for the grand jury’; and I told him, I said, ‘Yes, I will plead guilty,’ but I said, ‘I was forced to do so,’ and he asked me then and I told him that I took Max Cohen’s advice. They never brought me on to plead guilty, saying I would have to wait for the grand jury, and I have never pleaded guilty. I told them and admitted that I was guilty of lying, but that I was forced to do so. I don’t remember for sure when I was indicted by the grand jury, but I think it was right after my husband was sentenced to the penitentiary, or it was before.

Q. Why has not your case been brought on for trial?

A. Why, I was to wait for the grand jury, I think.

Q. Well, I know, but the grand jury indicted you

some several months ago. Now, why hasn't your case been brought on for trial?

A. It is on trial now, isn't it? It is on trial now. This is the trial now.

Q. You imagine this is your trial here?

A. I don't know. I don't remember the district attorney saying anything to me about the trial of my case; they subpoenaed me two weeks ago. I had a talk with them when I got out on bonds and they told me I wasn't to go away from Portland, and that I was under bonds, and they told me I was under bonds for Max Cohen's trial. I guess he was up for perjury, too. They didn't tell me when my case was to be brought on for trial. I don't know whether I have had any understanding with the Government about my case. I am held as a witness now. I agreed to plead guilty before I was indicted. I had no understanding with them in regard to pleading guilty after I was indicted. Mr. Pray and Mr. Maguire came and talked to me about my swearing falsely; they all told me that I swore falsely after I got off the stand, and they had conversations with me in the court house several times. I first told them about Mr. Cohen giving me advice when they sentenced my husband, which was two months after I had testified. The way I happened to tell them that was that I saw in the paper that I was up for lying, for perjury, and I went down and asked if I could plead guilty, and told them I had lied and was forced to do so by my lawyer, Max Cohen. The Government has not promised me anything in regard to my case, and I have no understanding with them. I don't know whether I will be prosecuted for perjury. I lied, but I was forced to do so. I have been

indicted, but I have not pleaded guilty and I am out on \$50 bail. I was indicted for perjury, and they told me they would dismiss it on my own recognizance, but that I wasn't to go away. I am quite sure they used the word dismiss. The man who came down and said I would be let out on my own recognizance was Mr. Duke, from the marshal's office. When I talked with Mr. Evans, and told him in answer to his question, that I wouldn't run away, he said he would try to put my bond as low as he could, and asked me if I could put up \$50. I told him yes, that was all I had. I don't quite remember what Mr. Evans said about dismissing. I didn't have any talk with Mr. Maguire or Mr. Mowry when I went out. I just spoke to Mr. Mowry about my case Saturday, and never saw him before then; I didn't talk with anybody else nor with Mr. Maguire. The only time I have talked with Mr. Maguire since I have been in jail was when I went down to plead guilty, and told him about Mr. Cohen telling me to deny that I had ever sported. I don't remember talking to anybody after Mr. Maguire. I talked to Mr. Pray once afterwards, but not the same day. I have talked to Mr. Pray a great many times. He was at the jail quite a few times, but not exactly to see me, and I spoke to him then. Mr. Pray didn't advise me to testify against Mr. Cohen, and nobody else said anything to me about it. I said that 'when I was going to plead guilty that I was going to say that I wasn't the cause of it, because I was forced to do so.' I didn't know whether I expect to be sent to the penitentiary, but I know I am not afraid. I have no promise from the government. I don't know whether I will be sent to the penitentiary."

The interest of Esther Wood was adverse to the defendant. Although a confessed perjurer herself, for the sake of immunity and to avoid the imprisonment at Lansing threatened by the Government officials, she became the Government's informant and witness in chief. The Government officials were very lenient to this witness. Her bail was fixed at \$50, while the defendant was required to put up \$10,000. The witness testified that she was not afraid and spoke of conversations with Mr. Evans regarding the dismissal of the proceedings against her. (See Record, page 31.)

After Esther Wood had been liberated on \$50 bail, we find, on page 33 of the Record, the following testimony given by her:

"I was convicted once in the police court of prostitution and pleaded guilty. They had me up for vagrancy. I have been sporting ever since they turned me out of jail. I pleaded guilty. That was since they let me loose from jail up here. They arrest all prostitutes as vagrants. I am now living in a house of ill-fame. I first reported to the Government pretty often, and I think they know I am down in a house of prostitution."

We find Rose Heller testifying as follows:

"I haven't done anything for a whole year nearly. I have been sick. I have been living at the Oxford, but I have now moved to the Levens, and I have not been sporting for over a year."

And Violet Wood says (page 40, Record) :

"I am a prostitute and live at the Levens Hotel."

With such witnesses and under threats of sending one of them to Lansing, the Government has pursued the defendant with unflinching zeal.

Water cannot rise above the source, and the probability of the defendant's guilt cannot rise higher than the probability of the truth of the testimony of the foregoing prostitutes. There is no proof of the defendant's guilt in this case, or proof of the *corpus delicti* except by the testimony of these women. If the *corpus delicti* was proved by evidence *aliunde*, then circumstantial evidence might enter into the case, but here we have a conviction based on the credibility of these three women of the underworld, and the chief one of them directly interested in the conviction of the defendant.

It is not enough in this case that the defendant was found guilty by the jury. That does not settle the ultimate fact of his guilt. He must have been found guilty according to law, and then he is, in any event, considered legally guilty. We think we have shown in this brief that serious error was committed, and we have referred to the character of the witnesses in order to throw a sidelight on the entire case and the nature thereof.

It follows from the foregoing reasons that the judgment of the lower court should be reversed, because—

1. The indictment is defective in that it is shown on the face thereof that the U. S. Commissioner had no jurisdiction to try the issue of whether or not Jake Gronich violated the White Slave Traffic Act.

2. No *prima facie* case was made out, for it was not shown that the defendant had any particular proceeding or person in view at which or before whom Esther Wood should give false testimony, and all the evidence of the conversations at the Oxford

Hotel on the afternoon of May 7, 1912, fails to show any subornation of perjury.

3. The materiality of the alleged false testimony, to-wit, the prostitution of Esther Wood prior to the preliminary hearing of Jake Gronich and the alleged false testimony given by her about the postal cards, ~~were~~ ^{was} not shown.

4. Esther Wood was prohibited from testifying against her husband by the state law, Sec. 1535 L. O. L., and perjury or subornation of perjury cannot be predicated upon testimony given under such circumstances.

5. Testimony obtained under duress or by force from a witness rightly entitled to and claiming the privilege of silence is not such testimony as will form the basis of a perjury or subornation of perjury charge.

Messrs. MANNIX & SULLIVAN,
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No. 2339

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA,	}
Respondent,	
vs.	}
MAX G. COHEN,	
Defendant and Appellant.	

BRIEF OF RESPONDENT.

STATEMENT OF FACTS.

The appellant Max G. Cohen, an attorney of Portland, Oregon, was indicted on November 23, 1912, by the United States grand jury for the District of Oregon; thereafter, the said criminal action came regularly on for trial before a court and jury, the Honorable R. S. Bean, Judge, presiding; on June 4, 1913, he was duly convicted by the verdict of said jury, and thereafter was sentenced by said court to serve a term of two years in a federal prison and

to pay a fine of \$100.00; it is from this judgment that this appeal is prosecuted.

Upon the trial it appeared in evidence that one Jake Gronich and another were arrested on May 7, 1912, charged with violating the White Slave Traffic Act, alleged to have been committed in procuring and causing the transportation of one Esther Wood from Cleveland, Ohio, to Portland, Oregon, for the purpose of prostitution and debauchery.

The said Esther Wood testified at the trial that she was the wife of Jake Gronich and that she was not present at the time the arrest was made. She returned to the hotel at which she and Gronich were stopping and, learning of the arrest, went to another room. The defendant was called from his office to consult with the said Esther Wood and three other prostitutes, and went to the room where these women were. He knew that Gronich had been arrested and had been charged with white slavery, and admitted under oath at the trial that he knew that the prosecution was to be had before the federal authorities. In this room the defendant was advised by Esther Wood that she was a prostitute and that she had practised as such in Denver, Colorado, in Baker City, Oregon, and in Portland, Oregon, being the places from which, through which and to which the Government charged that she had been transported for the purpose of prostitution and de-

bauchery. In the face of this knowledge, Cohen advised Esther Wood to testify that she had never practised prostitution in Denver, or in Baker City or in Portland, or in any other place in the United States. The defendant asked Esther Wood if the officers were in possession of any letters passing between her and Gronich, to which she replied there were some post-cards in her trunk, and the defendant advised her that if these were shown to her to say that she did not remember them and to deny any knowledge of them. Another girl had been transported at the same time and for the same purpose, and Esther Wood raised the question as to what she should do in the event that this other girl told the truth as to the prostitution of Esther Wood. The defendant advised Esther Wood that if such a state of affairs should exist and such testimony be given by the other girl that she, Esther Wood, was to say that the said prostitution was without the sanction of Gronich and was upon the own volition of Esther Wood, but not to say this until such time as it was certain that the other girl had given such information.

Esther Wood appeared as a witness before the United States Commissioner, at which place a hearing was had to determine whether or not Gronich should be held to answer to the grand jury. The defendant was present, represented the said witness as her counsel at said hearing, and heard her tes-

tify as he had advised her to do. At one of the adjournments of the court, in a conversation with her, he approved of the testimony that she had given.

It is admitted that the testimony of Esther Wood was wilfully and knowingly false, untrue and perjured, and the testimony of the government witnesses was directly to the point, that the defendant knew it was false and perjured and counseled the witness, Esther Wood, to give such testimony and was present at the time the perjured testimony was given. Gronich was held to answer, was later indicted, plead guilty and was sentenced to prison. Esther Wood was indicted for perjury, and the defendant Cohen indicted for subornation of perjury.

By their brief counsel for the appellant Cohen, have assigned many alleged errors. These alleged errors are here set forth in the order in which they are taken up in the brief and in which they will be answered. The errors assigned are substantially as follows:

1. Overruling the demurrer to the indictment because the indictment in some phases used the words "trial" and "issue" in describing the hearing and the determination thereof before the United States Commissioner (Transcript of Record, p. 81).

2. Refusal to grant a motion for a directed verdict of acquittal on the grounds that there was no

evidence that the defendant advised and procured Esther Wood to give false testimony in any judicial proceedings, but only to non-judicial officers of the government. (Transcript of Record, p. 81.)

3. That the court admitted in evidence certain immaterial testimony, upon which there could not be predicated, but on which the government did predicate the crime of perjury, and subornation of perjury. These instances are four in number:

(a) Admission in evidence of the Commissioner's complaint against Jacob Gronich, the husband of Esther Wood.

(b) Admission in evidence of the testimony of Esther Wood, given in the preliminary hearing before the United States Commissioner, in which she denied having ever practised prostitution anywhere in the United States.

(c) Admission in evidence of the postal-cards, which were sent and received by Esther Wood, and of which she denied having any recollection at her preliminary hearing.

(d) Admission in evidence of all the testimony of Esther Wood, who was the wife of Jake Gronich, on the grounds that said evidence was privileged and the privilege not waived.

4. The court erred in giving the following two instructions:

(a) That the fact Esther Wood was the wife of Jake Gronich is immaterial upon the charge of his violation of the White Slave Traffic Act, or upon this inquiry, subornation of perjury.

(b) That the fact Esther Wood was coerced into testifying against her husband by threats of being put in jail for contempt, is not material in this case.

The fourth division of errors consisting of the two instructions of the court, may properly be consolidated and their justification determined by the authorities which determine whether Esther Wood's testimony was material and admissible against her husband. (3 d.)

This leaves six alleged errors in the trial of this cause.

ANSWER TO ASSIGNMENTS OF ERROR.

I.

The trial court did not err in overruling the demurrer to the indictment on the grounds that the indictment used the words "trial" and "issue" in alleging the hearing before the United States Commissioner, in which the perjured testimony was given, because there was no extra-judicial proceeding

had or oath administered; the crime with which the defendant was charged, was sufficiently described in the indictment so that no prejudice occurred and all irregularities, if any, are cured by statute.

II.

The trial court did not err in refusing to grant a motion for a directed verdict,, which was made by the appellant at the close of all the evidence introduced upon the trial, for the reason that the evidence introduced by the government in support of its contentions, was sufficient to prove the commission of the crime alleged and was contradicted by evidence of the defendant. Thus an issue of fact was created, which must be submitted to the jury.

III.

The trial court did not err in admitting the following evidence:

(a) The United States Commissioner's complaint against Jacob Gronich, or

(b) The preliminary testimony of Esther Wood, or

(c) The postal cards received and sent by Esther Wood, because they were material in

proving the elements necessary to show a violation of the White Slave Traffic Act by Jacob Gronich, and with respect to which Esther Wood was advised, instigated and caused to testify falsely by the defendant Cohen.

IV.

The trial court did not err in admitting the testimony of the witness, Esther Wood, given at the preliminary hearing against her husband, Jacob Gronich, which was objected to by appellant, because such testimony is not privileged under the issues presented in such a case, and the court's instructions assigned as errors, numbers seven and eight, are correct declarations of the law.

POINTS AND AUTHORITIES.

I.

The indictment is sufficient when as in this case (1) it sets forth with clearness and exactness the proceedings in which the perjury instigated by the defendant was committed; (2) the facts relative to the defendant's subornation of the material witness, and (3) when the defendant is apprised of the charge against him.

United States vs. Cruikshank (1875), 92 U. S. 542, 568.

Rosenfeld vs. United States (C. C., 7th, 1912), 202 Fed. 469, 473.

The proceeding before the United States Commissioner is sufficiently described so that the verbiage of the words "trial" and "issue" are matters of form only, and the indictment is sufficient for all purposes when it states the essential facts which constitute the crime, in language which leaves no doubt in the mind of the defendant of what he is accused.

Markham vs. United States (1895), 160 U. S. 319, 324.

United States vs. Swift (D. C. Ill., 1911), 188 Fed. 92, 98.

The fact that the word "issue" is used with respect to the determination of the United States Commissioner's hearing, is not prejudicial to the defendant, because the Commissioner does determine both the issue of whether the crime charged has been committed, as well as the issue of whether there is probable cause to believe the accused did it.

United States vs. Greene et al. (D. C. N. Y. 1900), 100 Fed. 941, 944-5.

Latimer vs. State (1898), 55 Neb. 609, 612.

Reference is hereby made to Section 1795 of Lord's Oregon Law:

“If, however, it appear from the examination *that a crime has been committed*, and that there is sufficient cause to *believe the defendant guilty thereof*, the magistrate must make a written order, signed by him, to the following effect: ‘It appearing to me from the testimony produced before me on the examination, that the crime of (designating it generally) has been committed, and that there is sufficient cause to believe A. B. guilty thereof, I order him to be held to answer the same.’ ” (Italics ours.)

The variance between the words “trial” and “issue” and the true description of the hearing before the commissioner is nothing more than verbiage, and since no showing is made as to how the misdescription, if any, ever embarrassed the defendant, it is cured by statute.

Hoke vs. United States (1912), 227 U. S. 308, 324.

And since this assignment of error goes to matters of form only, and has worked no injustice to the defendant it is cured by the following adjudicated statute:

“No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.”

Sec. 1025 Revised Statutes of the United States.

Hedderly vs. United States (C. C. 9th, 1912),
193 Fed. 561, 565.

II.

In the trial court, in a criminal case, if the evidence for the government, which is assumed to be true in fact, together with all reasonable inferences therefrom, is not legally sufficient to support a verdict of guilty, it is the duty of the trial court on being moved thereto, to direct a verdict of not guilty.

Crumpton vs. United States (1891), 138 U. S.
361, 363.

France vs. United States (1897), 164 U. S.
676, 681.

Duff vs. United States (C. C. 4th, 1911), 185
Fed. 101, 102.

But since there is no authority in the Circuit Court of Appeals to inquire into either the *sufficiency* or *weight* of evidence, the three objections (a), (b) and (c) out of the four assigned of error on page 4 of appellant's brief, are not well taken.

Wiborg vs. United States (1895), 163 U. S.
632, 659.

Hedderly vs. United States (C. C. 9th, 1912),
193 Fed. 561, 571.

The Circuit Court of Appeals in considering a motion for directed verdict in the trial court can determine only the question of whether there is *any* evidence to sustain the verdict.

Hedderly vs. United States (C. C. 9th, 1912),
193 Fed. 561, 571.

And this determination must be made from all the evidence admitted in behalf of either the plaintiff or defendant.

Burton vs. United States (C. C. 8th, 1906),
142 Fed. 57, 59.

Stearns vs. United States (C. C. 8th, 1907),
152 Fed. 900, 905.

In so determining whether there is any evidence to sustain a verdict the appellate court need only ascertain from the record whether there is *any* evidence which, if credited by the jury, is sufficient to sustain the verdict.

Boren vs. United States (C. C. 9th, 1906), 144 Fed. 801, 804.

There is a sufficiency of evidence to meet this requirement.

Transcript of Record, pp. 21-23.

It seems that a conviction for the crime of subornation of perjury could be sustained upon the uncorroborated testimony of one witness.

Boren vs. United States (C. C. 9th, 1906), 144 Fed. 801, 805.

But in the case at bar there were three witnesses who testified to the facts upon which this crime is predicated, and the sufficiency and weight of the evidence is for the jury.

Hoke vs. United States (1912), 227 U. S. 308, 324.

And the jury passes upon the credibility of the witnesses.

United States vs. Brown (1846), Fed. Cas. No. 14,667.

III.

The following evidence was admissible and material, by the following authorities:

(a) The Commissioner's complaint against Jacob Gronich was admissible and material, because no one can be guilty of subornation of perjury unless some one is guilty of perjury.

Epstein vs. United States (C. C. 7th, 1912), 196 Fed. 354, 356.

United States vs. Howard (D. C. Tenn., 1904), 132 Fed. 325, 333-336.

The indictment charging subornation of perjury must necessarily set forth within itself all the essential averments concerning the perjury of the witness suborned, just as though the witness were accused by the same indictment of the perjury therein alleged.

United States vs. Howard (D. C. Tenn., 1904), 132 Fed. 325, 336.

In accordance with the above rules the indict-

ment herein charged Esther Wood with the crime of perjury committed before the United States Commissioner on the preliminary hearing of the case of United States vs. Jacob Gronich.

Transcript of Record, pp. 1-3.

To prove the allegations of the complaint and the materiality of Esther Wood's testimony, this complaint was admissible.

(b) Under the above authorities the testimony of Esther Wood, given at the preliminary hearing was admissible to prove that she was the one transported, and that she had practised prostitution.

(c) The postal cards sent and received by Esther Wood were admissible and material under the above authorities to prove the familiarity between Jacob Gronich and Esther Wood, and that she had been in the cities and states, names of which were thereon postmarked.

(d) Appellant contends that perjury cannot be predicated upon prohibited testimony, and that the testimony of Esther Wood, as the wife of Jacob Gronich, was prohibited by Section 1535 of Lord's Oregon Law, which has been adopted as a rule governing the qualifications of witnesses appearing before a United States Commissioner, by Section 1014,

Revised Statutes of the United States.

Answering this latter contention (d), it will be shown :

First. There are but two methods of adopting the state statute for the purpose of defining the qualifications of witnesses appearing before the United States Commissioner, and that neither has been used or applied in this case.

The law which governs the admissibility of testimony (therefore governs who shall be competent witnesses) in criminal cases must be determined (*a*) from the law of the state as it was when the courts of the United States were established by the Judiciary Act of 1789, and no law of a state made since 1789 can affect the qualifications of witnesses in United States courts (*b*) unless further sanction to the application of state law is authorized by Congress.

United States vs. Reid et al. (1851) 53 U. S.
(12 How. 361) 360, 363.

(*a*) Since the country now inclosed by the boundaries of the State of Oregon was not even a territory of the United States in 1789, and not admitted to the Union at that date, there were no rules governing competency of witnes-

ses which could be adopted, as suggested by the above adjudication.

Admission of Oregon, Act of February 14, 1859, Ch. 11, 11 Stat. L. 383.

(b) Appellant claims (Brief, p. 50) that further sanction to the adoption of state laws (Section 1535 L. O. L., enacted in 1864, prohibiting a wife or husband from testifying against the other, unless by consent of both, or in case of personal violence) has been made by Congress through the enactment of Section 1014, Revised Statutes, which provides as follows:

“For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or a superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeable to the usual *mode of process* against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United

States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshall to execute a warrant for his removal to the district where the trial is to be had." (*Italics ours.*)

(i) This section makes the Commissioner's proceedings "agreeable to the usual mode of process against offenders" in the local state of the Commissioner, when those offenders are "arrested and imprisoned, or bailed, as the case may be," and relates only "to preliminary examinations before a justice, judge or United States Commissioner for the purpose of issuing a warrant and holding to bail for appearance at court to answer to an indictment presented by a grand jury or to an information filed by the United States attorney * * *"

United States vs. Baumert et al. (D. C. N. Y., 1910) 179 Fed. 735, 742.

United States vs. Dunbar et al. (C. C. 9th, 1897) 83 Fed. 151, 154.

(ii) The expression “mode of process” has a judicially defined meaning, which does not include competency of witnesses, but relates to *procedure* before the United States Commissioner.

United States vs. Rundlett (1854), 2 Curt. 41, 48; Fed. Cas. No. 16,208.

United States vs. Patterson (1893), 150 U. S. 65, 67.

United States vs. Martin (D. C. Ore., 1883), 17 Fed. 150, 155.

United States vs. Sauer (D. C. Tex., 1896), 73 Fed. 671

And in the hundred and fifty reviewed adjudication of this section there is no mention, or even suggestion that this section applies to qualifications of witnesses appearing before the Commissioner.

(iii) Therefore, Section 1535 L. O. L., cannot be adopted as a rule for the qualifications of witnesses in criminal proceed-

ings before the United States Commissioner.

Second. The authorities cited in this division confirm the admission of the testimony of the wife, Esther Wood, on the grounds of an exception to the common law rule that a wife cannot testify for or against her husband, which exception is as well established as the rule itself.

The testimony of the wife, Esther Wood, was admissible against the husband, Jacob Gronieh, in his hearing for a violation of the White Slave Traffic Act, by the following authorities:

(a) The competency of witnesses in criminal trials in courts of the United States, when not governed by the adopting of state rules under the Judiciary Act of 1789 and not affected by express statutes enacted subsequently, is governed by the common law.

Logan vs. United States (1892), 144 U. S. 263, 303.

(b) General rule: At common law upon grounds of public policy the husband and wife were not permitted, even by consent of the other, to give evidence for or against the other, or to testify, even after the ending of the mar-

riage relation by death, or full divorce, to private communications which took place between them while it lasted.

Coke's "Commentaries on Littleton" (1628),
6 b.

Bassett vs. United States (1890), 137 U. S.
496, 505.

Hopkins vs. Grimshaw (1897), 165 U. S. 342,
349.

(c) This rule was based upon the following reasons:

(i) The "metaphysical fiction" that a man and wife are "*duae animae in carne una*."

Coke's "Commentaries on Littleton"
(1628), 6 b.

1 Wigmore "Evidence" p. 729; Sec. 601.

(ii) Marital identity of interest.

1 Wigmore "Evidence" p. 729; Sec. 601.

So far as "interested" parties are disqualified from being witnesses, this has been abrogated by statute.

Sec. 858 R. S.

(iii) Strong bias of feeling toward each other.

Johnston vs. Slater (1854) 11 Grat. 321, 323.

(iv) Public policy in avoiding the danger of disturbing the marital peace.

Kelley vs. Proctor (1860) 41 N. H. 139, 142.

Of these four mentioned reasons the principal one is that public policy prohibits prejudicing or violating the marital peace and happiness.

1 Wigmore "Evidence " p. 730, Sec. 601.

Kelley vs. Proctor (Supra).

(d) But when the above reasons for the common law rule are absent and the following considerations occur, the rule is relaxed and certain well established exceptions occur and these have been acquiesced in by a long line of decisions.

1 Wigmore "Evidence " Secs. 612, 2239.

Bassett vs. United States (1890) 137 U. S. 496.

Hopkins vs. Grimshaw (1897) 165 U. S. 342, 349.

(e) The exceptions to the rule, to-wit, cases in which the wife can, during marriage, or after, testify as to circumstances occurring during the marital relations, and which are ordinarily privileged, are as follows:

(i) Actions by the husband upon the wife, which are injurious to her, or the exercise of personal violence upon her.

Mr. East, "1 East Pleas of the Crown," 455.

Wigmore "Evidence " Secs. 612, 2239.

Basset vs. United States (1890) 137 U. S. 496, 505.

United States vs. Rispoli (D. C. Penn., 1911) 189 Fed. 271, 273.

(ii) The necessity of avoiding the extreme injustice to the excluded spouse, which would ensue from an undeviating enforcement of the common law rule.

Wigmore "Evidence " Secs. 2236, 612.

This necessity is described as: "Not a

general necessity as where no other witnesses may be had, but a particular necessity, as where for instance, the spouse would be exposed, without remedy, to personal injury or brutal treatment.” Lord Mansfield.

Bentley vs. Cooke (1784), 3 Dougl. 422.

ARGUMENT.

I.

No Error in Overruling the Demurrer.

Appellant claims error in overruling the demurrer because the indictment against him alleges there was the “trial” of an “issue” before the Commissioner, when in fact the Commissioner has no jurisdiction to try an issue.

In the following selected portions of the indictment there will be found a clear, true and sufficient statement of the hearing before United States Commissioner, which does not mention any “trial,” but refers generally to an issue and properly so. The indictment against Max G. Cohen does allege:

“That on, to-wit, the 9th day of May, 1912,

there came on * * * before the Honorable Anderson M. Cannon, United States Commissioner for the District of Oregon * * * a certain charge and complaint then and there pending before the said United States Commissioner against him, the said Jake Gronich, for a violation of the White Slave Traffic Act. * * * the defendant herein, Max G. Cohen, * * * did unlawfully, knowingly, feloniously and corruptly procure, advise, obtain and suborn one Esther Wood * * * to give in evidence before the said United States Commissioner certain matters material and relevant to the issue * * * And that afterwards * * * the said issue was * * * heard before said United States Commissioner, and the said Esther Wood * * * was duly sworn by the said United States Commissioner, who was then and there an officer authorized by the laws of the United States to administer oaths, and took her oath as such witness before the said United States Commissioner that the evidence which she, the said Esther Wood, would give at said * * * hearing, would be the truth, the whole truth and nothing but the truth; and it did then and there upon said * * * hearing, become and was a material inquiry whether she, the said Esther Wood, had ever practised prostitution," etc., and "the said

Esther Wood so being sworn and having taken her oath aforesaid, * * * upon the * * * hearing of said * * * cause, did wilfully, corruptly and knowingly and contrary to her said oath, swear and depose before the said United States Commissioner, and in said United States Commissioner's court among other matters material to said inquiry, in substance and to the effect following, that is to say: * * *

And the indictment then further recites the facts relating to the subornation.

The word "issue" used twice in the above quotation is not an incorrect use thereof, since the United States Commissioner in every case brought before him, does try two issues, to-wit, whether the crime charged has been committed, and whether there is probable cause that this particular defendant did commit the crime. *United States vs. Greene et al.*, 100 Fed. at p. 945; *Latimer vs. State*, 55 Neb. at p. 612; L. O. L., Section 1795 (*Supra*).

Therefore the indictment in this case does clearly set forth the essential allegations necessary to describe the Commissioner's hearing in which the suborned perjury was committed, in language which leaves no doubt in the appellant's mind as to what preliminary hearing was intended and who was the witness suborned, and the indictment is good.

This principle is expressed by CARPENTER, D. J., in *United States vs. Swift*, 188 Fed. at page 98:

“It is apparent that the foregoing objections to the indictment go to matters of form rather than to matters of substance. An indictment is well enough that states facts which constitute a crime, and in language which leaves no doubt in the minds of the defendants of what they are accused. It is true that a defendant should be informed clearly by the indictment of the exact and full charge made against him, yet the manner in which the information is given is important. An indictment is sufficient when it contains a substantial accusation of crime, and its statements furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail him of his conviction or acquittal for protection against the further prosecution for the same offense, and when, from it, the court can determine that the facts charged are sufficient in law to support a conviction.”

Since there are sufficient allegations in this indictment to describe the Commissioner's preliminary hearing wherein the perjury was committed, the word “trial” is verbiage and matter of form

only and as such cured by the remedial statute enacted for such purpose, which is Section 1025, R. S., previously quoted, and which abolished formal objections.

MORROW, CIRCUIT JUDGE, has concisely stated the principle applicable in this particular in the case of *Hedderly vs. United States*, 193 Fed. at page 565:

“The objection that the charge of conspiracy is not sufficiently alleged is therefore made for the first time in this court; but, even if it be held that the demurrer did include such an objection, it will not avail the plaintiff in error, unless it appears that the substantial rights of the accused have been prejudiced by the refusal of the court to require a more specific and detailed statement of the particular means or mode employed in committing the offense. U. S. Rev. Stat., Sec. 1025. * * * In the present case it appears from the record that the defendants were fully advised of and understood the precise facts charged against them, and which were alleged to be in violation of the statute, and it does not appear that the substantial rights of the defendants were prejudiced in any way by the alleged lack of definiteness or certainty or the sufficiency of the facts charged in the indictment.”

II.

Motion for Directed Verdict Properly Denied.

The rule governing trial courts in the determination of whether they shall direct a verdict of not guilty is expressed by MR. JUSTICE PECKHAM, in *France vs. United States*, 164 U. S. at page 681:

“When proper and legal evidence has been given on the part of the government in a criminal trial, which if believed, is sufficient in law to make out a crime and to sustain a conviction of the person on trial, a request to the court to direct the jury to acquit must be refused, and an exception to such refusal raises no question of law, even though the evidence on the part of the defendant is much stronger and more satisfactory than that for the government. The question under such circumstances is one for the jury and not for the court.”

And the learned justice continues in substance to state that where such evidence as he has above described, has been given on the part of the government with all proper inferences which may be drawn therefrom, and which inclines to the support of the government's case, the issue is one which properly goes to the jury for a finding thereon.

The same principle is well stated by ROSE, D. J., in *Duff vs. United States*, 185 Fed. at page 102:

“In a criminal cause, where the evidence for the government, if assumed to be true in fact, together with all reasonable inferences from it, is not legally sufficient to support a verdict of guilty, it is the duty of the trial court, upon being moved thereto, to direct a verdict of not guilty.”

But the trial court has passed upon the legal sufficiency and weight of evidence in this case and the appellate court has no authority to consider these points, but must confine its inquiry to whether there is *any* evidence to support the verdict.

This principle was accurately stated in this ninth circuit by MORROW, CIRCUIT JUDGE, in the case of *Hedderly vs. United States*, in 193 Fed. at page 571:

“At the close of the evidence on the part of the prosecution, counsel for the defendant moved the court to instruct the jury to a verdict of not guilty. This motion the court denied, to which exception was taken. This denial left it open to the court to consider whether there was any evidence to sustain the

verdict though not to pass upon its weight or sufficiency * * * After verdict finding the defendant guilty, a motion was made for a new trial on the ground of the insufficiency of the evidence to justify the verdict. This motion was denied. The granting or refusal of such a motion was a matter of discretion in the court, and cannot be reviewed here. * * * We have no authority to inquire into the sufficiency of evidence to support a verdict. If there is any evidence, the issue of fact must be determined by the jury. It cannot be revised by the court.”

And GILBERT, CIRCUIT JUDGE, in *Boren vs. United States*, 144 Fed. at page 804, has justly defined what legal dignity the term “any evidence” must bear to be binding upon the appellate court:

“If, as contended by the plaintiff in error, under the authority of *Clyatt vs. United States*, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726, we are to examine the testimony to see if there was evidence to justify the jury’s verdict, we have no difficulty in finding in the record evidence which, if credited by the jury, was sufficient to sustain their finding.”

In the case at bar to illustrate that there was some evidence, which if the jury believed, would

justify a verdict, that testimony of Esther Wood is referred to, which states that she saw Mr. Cohen

“the next morning (after her taking under mitimus) at the city jail * * * and he said they would take me up that morning and that I shouldn’t talk until he got there, and should be sure and stick to my story * * * I was taken down here to the postoffice that morning and put in a room and sworn. I told them I refused to answer and wanted to see my attorney, Mr. Cohen. I didn’t testify that day, and they took me back. First, Mr. Cohen came in and spoke there for awhile, and when I went into the hall, he asked me did I talk, and I told him ‘No,’ and he said ‘Good.’ ”

This was all apparently in anticipation of the preliminary hearing and the advice to “stick to my story” undoubtedly had reference to the story the appellant had already given her, to-wit, that she “shouldn’t talk until he got there,” and to “deny she had ever sported” (Transcript of Record, p. 19), and when the postal cards between Jacob Cohen and herself were shown her as the written evidence of their familiarity, to “say you don’t remember.” (Transcript of Record, p. 20.)

The fact that her conduct upon the preliminary hearing was just as appellant had intended is shown by Esther Wood’s testimony that when “he asked

me did I talk, and I told him 'No,' and he said 'Good.' ” Here was the stamp of appellant's approval upon her conduct adopted because of his instructions thereon.

Although one preliminary hearing had been held, and appellant knew it had been held and continued to another date, he still advised Esther Wood to “stick to my same story” (Transcript of Record, p. 21), and finally appellant informs her and definitely advises and procures her to swear falsely before the commissioner, as shown by the following testimony of the witness:

“I saw Mr. Cohen at the city jail that noon, and he told me to stick to my story, and that they would have the preliminary at some time that afternoon, and he told me not to talk until he got there.

“They brought me back to the postoffice building that same afternoon, and put me on the stand, Mr. Cohen being present, and I testified that afternoon of May 9th. just as Mr. Cohen advised me to tell. They asked me had I ever practiced prostitution in Baker, and I told them No, knowing at the time that I had, as a matter of fact, practised prostitution in Baker, and so testifying because Max G. Cohen

advised me to. They asked me whether I practised prostitution in Denver. I said No, knowing as a matter of fact that I had, and so testifying because Mr. Cohen advised me to. They asked me had I ever practised prostitution at any place in the United States. I told them No, knowing that it was untrue and that I was swearing falsely; and they asked me had I ever practised prostitution in Portland, and I told them No, knowing that I had, and so testifying because Mr. Cohen advised me that way, and said it was the only way to save Jake Cohen, because they found the tickets on him.

“At that examination they exhibited the postal cards to me, which I recognized, and the one now shown me is one of them. It was sent me by Jake Gronich, from Canton, Ohio, and received by me in Denver, Col. (Postal card marked government’s Ex. 4.) I also recognized this card which was shown to me at that examination and which was received by me in Portland, Oregon, from Jake Gronich. They asked me at the examination had I ever seen this card, and I said once No, and then I said that I didn’t remember, and I knew I had seen the card before and was swearing falsely. I so testified because my lawyer advised me to.

“Another card was shown to me, which is in my own handwriting, and they asked me whether it was my handwriting, and I told them No, and then I told them that I didn’t remember; and when they asked me had I ever seen the card before, I told them that I didn’t remember. I knew at the time that I had seen it before and did remember it, but so testified because my attorney advised me to. The Max G. Cohen I have spoke of as my attorney is the defendant here.” (Transcript of Record, pp. 21-23.)

The above testimony of Esther Wood to the effect that she was advised by Cohen to testify that she did not remember the postal cards is corroborated by the testimony of Violet Woods. (See Transcript of Record, p. 39.)

The above testimony of Esther Wood to the effect that she was advised by Cohen that she had never practised prostitution, is corroborated by the testimony of Rose Heller. (See Transcript of Record, p. 35), and the testimony of Violet Woods (See Transcript of Record, p. 39).

The foregoing testimony establishes the fact that Esther Wood did testify falsely and did so in execution of the very plans, advice and procurement of Cohen.

This testimony further establishes the motive in procuring and advising her to testify falsely, to-wit: his client's interest being his own, he advises her of the only way to save her husband.

And, finally, this quoted bit of testimony brings out the fact that while Esther Wood may, and does at times use the word "they" as referring to non-judicial officers, because her ignorance allowed her no more accurate description of the officials or proceedings in which she was a witness, she also applies the word "they" to judicial officers and inquirers in judicial proceedings. There is no magical application of the word "they" found here, as appellant would suggest in his brief (pages 36-38), but just an ordinary general use thereof by a person of limited knowledge and means of expression.

Is there some testimony here for the jury to credit? If so, the motion for a directed verdict of acquittal was properly denied by the trial court.

Appellant (See Brief, p. 40) raises a question concerning the corroboration of testimony in cases of subornation of perjury. If corroboration is necessary, there is sufficient to meet all requirements of the law, as stated by GILBERT, CIRCUIT JUDGE, in *Boren vs. United States*, 144 Fed. at page 805:

“We find that in *People vs. Evans*, 40 N. Y. 1, it was held that subornation of perjury may not be proven by the uncorroborated testimony of the person suborned. The contrary was held by Judge Deady in *United States vs. Thompson* (C. C.) 31 Fed. 331. In *State vs. Renswick*, 85 Minn. 19, 88 N. W. 22, it was held that, where it is sought to establish by his own testimony the perjury of the person suborned, his testimony must be corroborated, but that the facts that the accused suborned or induced him to commit the crime may be established by the uncorroborated testimony of the witness if it satisfies the jury beyond a reasonable doubt.”

Appellant further complains that he is convicted upon the testimony of three self-confessed prostitutes (There is no evidence of their being “habitual,” as stated in appellant’s brief, p. 2), but appellant testified in his own behalf, and now must find his consolation in the fact that the jury must pass upon the credibility of witnesses.

United States vs. Brown, Fed. Cas. No. 14, 667.

The courts have so repeatedly held that the jury is the exclusive judge of the weight of the testimony and the credibility of the witnesses that citation of

authorities to establish that point of law seems out of place in this brief. Here we have the testimony of three witnesses and strong corroborative circumstances to prove that the appellant, a practising attorney, wilfully and deliberately advised and procured a witness to testify falsely in a criminal procedure. He now urges that, admitting the immorality of his offense, he has committed no crime against the statute, because of the fact that the perjured testimony was not material to the issue. Cohen was charged with having transported his own wife for the purpose of prostitution and debauchery. Was it not material to prove that at the place from which she was transported, at the place through which she was transported and at the place to which she was transported, she was a public prostitute? It would, of course, be perfectly proper for a man to transport or accompany his own wife from one state to another, but when we find a man transporting his own wife for unlawful purposes from one state into another, is it not material, under the Mann Act, to prove that at the place from which she came, at the places through which she was transported and at the place to which she was transported, she was a public prostitute and practised as such? The appellant, as an attorney, evidently recognized the materiality of this testimony, because it is shown by the record that he advised the witness, Esther Wood, to testify falsely concerning it. It is admitted that Esther Wood did appear before the

United States Commissioner at a time when the appellant was present, and there in his presence, he heard her under oath testify falsely, just as he had advised her to do. Whether the testimony given against the appellant was entitled to credence or not was a question solely for the jury, and the jury decided the issue against the appellant. If it is to be now held that the testimony of a woman who admits her prostitution in open court, is not entitled by a jury to credence, then the Mann White Slave Act might just as well be repealed, because in this class of cases, after a woman has been made a prostitute she will probably be the only person capable of testifying to the facts material to sustain a charge under the White Slave Act. The appellant, at the time he called upon these women, knew that they were prostitutes. It will, of course, be, by the court, as it must have been by the jury, borne in mind that if a man is going to suborn a person to commit the crime of perjury, he will not select a leading citizen of the state, but such a crime will be practised upon the poor, the down-trodden and the unfortunate; and as scarlet as these women were, they were entitled to more credence than an attorney so unmindful of his oath as to advise them to commit the crime of perjury; it is a fact held by all prosecutors in cases of this character that this class of unfortunate, fallen women place the utmost reliance upon advice given to them by their attorneys; with the hand of organized society raised against them, with the doors of

every home closed to them, with the knowledge that no self-respecting man or woman will speak to or recognize them upon the street, subject as they constantly are to the grafting demands of petty officers, the only class of men disguised by a semblance of respectability with whom they come in contact are the attorneys who appear for them when they are arrested or in trouble; and these women follow the advise of attorneys implicitly.

Every fact necessary to prove the crime charged in the indictment was proven by more than one witness and strong corroborative circumstances.

III.

No Immaterial Evidence Was Admitted.

(a) The admission of the United States Commissioner's complaint in this case was necessary and proper on two grounds: *First*. Under the authorities it is necessary that the crime of perjury be alleged, and in so alleging it, there is necessity of alleging the proceedings in which the perjury occurred.

HAMMOND, D. J., in the case of *United States vs. Howard*, 132 Fed., at page 333, said:

“It is conceded, however, by the district at-

torney that, notwithstanding these reformatory statutes, it is still necessary to aver in an indictment for subornation of perjury all of the essential elements of the perjury committed by the witness suborned, just as if that witness himself were on trial for the crime of perjury, and it is by that rule we must test these indictments * * * in charging subornation of perjury, it is necessary to carry within the indictment every essential averment concerning the perjury itself by the witness suborned, just as if that witness were accused by the same indictment of the perjury for the purpose of placing him on trial for that offense (Page 336). * *

* The argument made by the learned counsel for the defendant against this position is that it is settled by the cases and conceded by the district attorney that an indictment for subornation of perjury must be founded in its averments about the subornation against the defendant upon each and every necessary allegation concerning the perjury of a suborned witness that is required by law to be inserted in an indictment against that witness for the perjury. He very happily calls it a circle within a circle of indictments, each of which must be complete."

And to prove the allegations of the indictment and the commissioner's hearing the complaint was

a necessary and proper bit of evidence.

Second. It is shown by the commissioner's complaint (Transcript of Record, p. 41) that it became material under the charge there made against Jacob Gronich to know whether Esther Wood was (1) a prostitute, (2) familiar with and knew Jacob Gronich, and (3) was transported in a forbidden interstate traffic. Therefore, the complaint was admissible to show the materiality of the false or perjured testimony, as well as the fact that Esther Wood was a material witness to prove these matters which were peculiarly within her knowledge.

In what better manner than by the introduction of the complaint in the case of United States vs. Jacob Gronich could the issues involved in that hearing be proved?

(b) The testimony of Esther Wood given before the commissioner in the preliminary hearing was admissible (Barring the consideration of material privilege discussed under (d) *infra*) because it was from a witness who could inform the committing magistrate whether there had been a crime committed by interstate transportation of a prostitute, and whether there was probability that the defendant charged, had committed the transportation. This testimony was given, but insofar as it related to the practice of prostitution, the same was false. The evidence shows that this testimony was known and intended to be false, though under oath, at the instance of the appellant Cohen.

Therefore this evidence was admissible because material and because it was perjured, as alleged in the indictment, and perjured because of the procurement, instigation and advice of Cohen.

(c) The postal cards exhibited to Esther Wood at the commissioner's hearing were admissible therein to connect this witness with the defendant, there being *prima facie* no similarity of names, and to show the familiarity between the transporter and the transported; also the postal cards themselves showed the cities in the different states where the prostitute had been.

This evidence being false, was admissible as previously explained, in connection with the testimony of Esther Wood.

(d) Appellant contends, truthfully, that it is axiomatic that evidence which is prohibited cannot be legally material and that the statute and authorities require the testimony upon which the crimes of perjury, as well as subornation of perjury, are based must be predicated upon material testimony.

Appellant further claims, improperly the government submits, that the testimony of the wife, Esther Wood, was prohibited in the commissioner's hearing against the husband, Jacob Gronich, and

therefore not material and not such evidence as would form the basis of the crime of perjury, and therefore the crime of subornation of perjury.

First. The answer to this contention as outlined in the corresponding division of Points and Authorities, p. 17, is to show that appellant's theory of the adoption of Sec. 1535 of Lord's Oregon Law is not correct. Appellant claims that said section, which provides that neither the husband or wife will be allowed to testify against the other in criminal cases, except on consent of both or in cases of personal violence by one on the other, governs the admission of testimony in hearings before the United States Commission, because this section of the Oregon State law was adopted by congress along with the criminal procedure. by Sec. 1014 of the R. S.

It is clear, of course, that no Oregon State criminal procedure was adopted by the Judiciary Act of 1789, and counsel relies upon this Sec. 1014 R. S. as being the further act of congress, which CHIEF JUSTICE TANNY said in the case of *United States vs. Reid*, 53 U. S., at page 363, was necessary to secure further application of state criminal procedure to the federal court.

The reasons why Sec. 1014 R. S. does not apply to the qualifications of witnesses appearing before

the United States Commissioner are at least three in number.

1. By the terms of the statute, which is set forth in full in page 17, of this brief, it is clear that this section applies only to procedure or steps in the process of commitment, and not to qualifications of witnesses.

RAY, DISTRICT JUDGE, in *United States vs. Baumert et al.*, 179 Fed., at page 742, said:

“I do not think Sec. 1014 Rev. St. * * * has anything to do with regulating prosecutions by information. That section relates to preliminary examinations before a justice, judge, or United States Commissioner for the purpose of issuing a warrant and holding to bail for appearance at court to answer to an indictment presented by a grand jury or to an information filed by a United States attorney.”

And ROSS, CIRCUIT JUDGE, said in *United States vs. Dunbar, et al.*, 83 Fed., at page 154:

“The purpose and effect of the use by congress of the words in the foregoing provision, ‘agreeably to the usual mode of process against offenders in such state,’ was to assimilate all the proceedings for holding accused persons to answer before a court of the United States to the

proceedings had for similar purposes by the laws of the state where the proceeding should take place. A United States Commissioner, acting under this statute, is simply a committing magistrate."

The expression, "mode of process," which counsel contends means qualifications of witnesses, has a particular judicially defined meaning, to-wit: "procedure," and does not relate to qualifications of witnesses.

MAXEY, D. J., said in *United States vs. Sauer*, 73 Fed., at page 673:

"In the three cases cited (U. S. vs. Rundell, 2 Curt, 41-48, Fed. Cas. No. 16,208; U. S. vs. Horton, 2 Dill. 94, Fed. Cas. No. 15,393; U. S. vs. Case, 8 Blatchf. 250-254, Fed. Cas. No. 14,742) the decisions are based upon the ground that, under Sec. 1014, Rev. St., the courts are relegated to the state statutes to ascertain and determine the nature and extent of the duties and powers of commissioners in arresting, imprisoning and bailing persons accused of offense against the United States."

DEADY, D. J., in *United States vs. Martin*, 17 Fed., at page 155, said that Sec. 1014 R. S.:

“ * * is the authority under which a commissioner of the circuit court acts when engaged in a proceeding for the arrest, commitment or bail of a person charged with a crime against the United States, and such section provides that he shall proceed therein, ‘agreeably to the usual mode of process’ against offenders in such state.

“A commissioner acting under this statute is simply a committing magistrate . The ambiguous phrase, ‘Mode of process,’ is interpreted to mean ‘Mode of proceeding,’ and this proceeding is according to the law of a state in similar cases. (Authorities.)

“The validity of the process and order in question must, then, be determined by reference to the law of Oregon for the arrest, examination and commitment of persons charged with the commission of crime against the laws of a state. The statute law of a state upon the subject is found in chapters 33, 34, 35 and 36 of the Code of Civil Procedure.”

And MR. JUSTICE BREWER said, in *United States vs. Patterson*, 150 U. S., at page 67:

“It was held in the case of *U. S. vs. Ewing*, 140 U. S. 142 * * * that, in view of Sec. 1014

of the Revised Statutes, the law of a state in which the services are rendered must be looked at in order to determine what is necessary in the matter of procedure.”

Under consideration of appellant's contention a review of some one hundred and fifty adjudications of this section was made, and in no one of these cases was there the slightest suggestion that this portion of the Revised Statutes applied to qualifications of witnesses.

2. Though the statute does refer the United States Commissioner to his state practice for his proceedings, it cannot be presumed, in the absence of an expressed intent on the part of congress, that there are to be different qualifications for witnesses appearing before United States Commissioner from those who appear before United States courts. State laws cannot be presumed to govern one while common law governs the other.

3. This section was originally a portion of the Act of September 24, 1789, and was modified by Act of August 22, 1842, Ch. 188, 5 Stat. L. 516, and was therefore in existence when MR. JUSTICE GRAY made his famous decision in the case of *Logan vs. United States* (1892), 144 U. S., 263, in the rendering of which he was unable, though assisted by

learned counsel, to find any act of congress modifying the common law rule governing the competency of witnesses.

Therefore, how can Sec. 1536, Lord's Oregon Law, enacted in 1864, be adopted as a rule governing witnesses appearing in United States cases in this district?

But granting, without admitting, that this section of Lord's Oregon Law does apply, the exception therein named, to-wit: that of "personal violence," would still authorize the admission of the testimony of Esther Wood against her husband under the following rudimentary rules discussed in the second section of this assignment of error.

Second. Under this division of Points and Authorities (page 20) citation is made to the fact that so far as the District Court of the United States for the District of Oregon is concerned the competency of witnesses is governed by rules of the common law.

MR. JUSTICE GRAY, in *Logan vs. United States*, 144 U. S., at page 303, said:

"And, therefore, the competency of witnesses in criminal trials in the courts of the United States is not governed by a statute of the state

which was first enacted in 1858, but, except so far as congress has made specific provisions upon the subject, is governed by the common law * * *

And MR. JUSTICE BREWER, in *Bassett vs. United States*, 137 U. S., at page 505, has concisely stated that:

“It was a well known rule of the common law that neither husband or wife was a competent witness in a criminal action against the other, except in cases of personal violence, the one upon the other, in which the necessities of justice compelled a relaxation of the rule.”

The reasons for this rule have been enumerated under Points and Authorities, and suffice it to say that the principal one is that of public policy in avoiding the danger of disturbing the marital peace.

SARGEANT, J., in *Kelly vs. Proctor*, 41 N. H. at page 142, said:

“We believe that the true reason why a wife should not be allowed to testify either for or against her husband * * * has always been a sort of compound reason founded partly in interest, to be sure, and the identity of the persons, but partly also upon conditions of public

policy. We think that considerations of public policy—the fear of sowing dissension between man and wife, and of occasioning perjury * * are equally satisfactory reasons why they should not be allowed to testify in each other's favor. It is to be feared that * * * the wife would find herself called upon too often to choose between her duty to her God and the requirements of (not to say her duty to) her husband * * *.”

Therefore when the reasons for this common law rule are removed, and particularly the above mentioned reason founded on public policy, should not the courts relax the strictness of its application?

In other words, is the beautiful, mystic garment of *pax conjugal*is of such great force that it protects White Slavers in their concubinage and prostitution? Has not the previous gross violation of marital duties precluded any such possible breach of marital peace that the law must privilege the testimony of either party?

Legal precedents hold that the testimony of Esther Wood was admissible in the preliminary hearing of her husband for violation of the Mann Act, because it sounded in two of the well established exceptions to the common law rule preventing a wife

from testifying against her husband. These are:

(1) She has suffered personal violence, as Mr. Wigmore says in his monumental work on Evidence, Sec. 2239:

“At common law in early practice the notion of an injury to the wife was not regarded as including much more than those corporal brutalities which satisfy most gross and elementary conceptions of wrong. But as times have gone on, more refining distinctions have been countenanced; especially under the statutory exceptions for crimes against the other, it has been possible for courts to take a broader view.”

Under this section some courts have held adultery, incest and bigamy to be within the meaning of the statute avoiding the privilege. This is not necessary in federal courts under 24 Stat. L. 635, covering such cases.

And (2) if the wife were not permitted to testify against her husband she would be continuously exposed without remedy, to his brutal treatment and personal injuries.

See MR. JUSTICE BREWER'S statement in *Bassett vs. United States*, 137 U. S., at page 508, next last above quoted.

J. D. McPHERSON, D. J., in the case of *United States vs. Rispoli*, 189 Fed., at page 273, said:

“The court overruled the defendant’s objection of privilege, and permitted the witness to be examined, on the ground that the offense charged was against the wife’s person as really as if the defendant were charged with threatening to inflict physical violence, or of having actually struck her. In cases where the wife’s personal rights were concerned, the exceptions to the husband’s privilege should be benevolently regarded, and the offense in question was essentially within the spirit of the long established rule that allows her to testify in protection or in vindication of her right to be secure in her person against threat or assault, even by her husband.”

The above case was one in which the defendant charged with the violation of the Mann Act raised the question of his privilege to prohibit the wife from testifying against him. The case is on “all fours” with the one at bar and is justified under the above mentioned and established exception to the common law rule.

The consideration of this matter of privileged testimony is left with a *quere* unanswered because of lack of time for research. Can the appellant Cohen, who is not the husband of the witness, claim that her testimony is privileged when used against

him, the appellant, in the absence of any such claim on the part of her husband?

The essence of the privilege in the above common law rule is to protect the confidence and conjugal peace only, and thereby foster confidence. Wherein can the law feel any necessity in behalf of this stranger to the marital relation in privileging this testimony?

Wigmore, "Evidence," Secs. 2336-2340.

IV.

No Error in the Court's Instructions.

Both the instructions of the trial court assigned as errors seven and eight, dealt with the testimony of the wife against her husband and to the effect that this testimony was not privileged. These alleged errors have been dealt with under the previous discussion and no further note need be taken thereof, except to conclude that the trial court made no error in its declaration of the law, but was supported by a historic line of exceptions to the historic rule.

V.

Miscellaneous Refutations.

On page sixty-one of the brief of the appellant

the act of congress known as the "White Slave Act" is designated as and referred to as a "huge joke." The same views were evidently entertained by the appellant at the time he counseled Esther Wood to commit the crime of perjury. The law may be a "joke" to a police court practitioner or to one whose principal business is the defense of men charged with this, the vilest of crimes; but to the self-respecting, decent American citizen the law appeals as one enacted for the benefit of society, to prevent a lot of vultures from preying upon the necessities of unfortunate and ignorant women. The law which prohibits a vampire from living off the earnings of creatures of the under-world may be a "joke" to the appellant and his attorneys, who characterize it as such, but to the majority of American citizenship it appeals as a most forceful weapon to be used in stamping out the most damnable, pernicious and unpardonable sin and crime; the law is not regarded as a "joke" by this office, and the presence of many immaculately dressed pimps and macquereaux in federal prisons is a splendid testimonial that the law is not considered as a "joke" by federal judges and juries. The presence of such a statement as this in a brief, filed in one of the highest courts of the land, furnishes almost conclusive proof of the character of the man in whose behalf the brief was written.

There are so many inconsistencies and misstatements in the brief of the appellant that it will be impossible to call attention to all of them. A few of the most glaring, however, should not be passed without comment.

On page sixty-six of the brief is the voluntary observation that the appellant walked into a trap set for him. There is no evidence to prove this assertion. What he did was to deliberately advise a woman to commit perjury. This is a favorite resort of police court lawyers, and it is regrettable that more of them are not caught at their nefarious practice and put in places where they can no longer prey upon the public and outrage the decency of the profession they disgrace by their being associated with it.

It is charged on page seventy that Esther Wood was released on \$50.00 bail and that this is strong evidence that the government was very lenient with her, but the proof showed that she had already spent months in jail for a wrong for which she was not to blame, but for which the appellant was entirely to blame. It does not sound well for the appellant to speak of leniency being shown a criminal and to complain of the same. He stands convicted of the crime of subornation of perjury, a crime not only

against the laws of his country, but against the very oath that he took as an attorney. He is released on bail and the bail which he gave was easier for him to produce than it was for the prostitute, Esther Wood, to produce a bail of \$50.00 after she had been in jail for months.

On page seventy of the brief appears this glaring misstatement: "With such witnesses and under threats of sending one of them to Lansing, the government has pursued the appellant with unflinching zeal." What the government has done is to insist that the attorney who advises a prostitute to commit the crime of perjury should not be permitted to longer disgrace the honest profession of law and to decline to admit that an attorney is privileged from prosecution.

IN CONCLUSION, IT IS SUBMITTED that the appellant had a fair and impartial trial, before a fair and impartial judge and jury; that he was duly convicted, as he ought to have been; that the situation that now confronts him is not the result of anything other than his own deliberate, wrongful, base and dishonest act, as proven by competent witnesses at his trial; for these reasons the government insists that the verdict should be upheld and should receive the approval of this Honorable Court.

With the hope that this brief may be of some assistance in arriving at a just conclusion, it is

Respectfully submitted,

CLARENCE L. REAMES,
United States Attorney.

ROBERT R. RANKIN,
Assistant United States Attorney.

United States
Circuit Court of Appeals

For the Ninth Circuit.

NORTH PACIFIC STEAMSHIP COMPANY, a
Corporation, Claimant of the Steamer
"ROANOKE," Her Boilers, etc.,
Appellant,

vs.

A. SJOGREN, J. E. JOHNSON, A. DISHER, GEO.
M. REED, G. W. JACOBS, GEO. K. BEK-
KER, M. MEISLAHN, P. CAIN, F. G.
PALMER, CHRISTIAN CHRISTENSEN,
A. JOHNSEN, OSKAR JOHANSEN, A. C.
ANDERSEN, E. ANDERSON, H. ANDREA-
SEN, J. PITTS, J. MARTIN, W. E. PITTS,
E. ANDREWS, R. TENNANT, B. FRAN-
KEL, K. G. CLARK, V. MATSON, A. FRA-
SER, M. STALEY (FAHEY, W. KRE-
MER, A. S. CASKEY, S. B. NILSEN, A. G.
CLARKE, J. KOTCHARIN, C. GIBSON,
—— HANSEN,

Appellees.

Apostles.

Upon Appeal from the United States District Court for
the Northern District of California,

First Division

FILED

JAN 5 - 1914

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[**Praeceptum for Apostles.**]

*In the District Court of the United States, Northern
District of California, First Division.*

IN ADMIRALTY.

OSKAR JOHANSEN et al.,

Libelants and Appellees,

vs.

The Steamer "ROANOKE," etc.

NORTH PACIFIC STEAMSHIP COMPANY, a
Corporation,

Claimant and Appellant.

To the Clerk of the Above-entitled Court:

You are hereby instructed to prepare the apostles on the appeal herein in the Circuit Court of Appeals, to consist of the following:

1. A caption exhibiting the style of the court and the title of the cause and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal.

2. The libel and the date when the same was filed.

3. The process of the arrest of the steamer "Roanoke."

4. The claim filed by North Pacific Steamship Company, a corporation, claimant herein, together with stipulation and undertaking filed therewith.

5. The answer of said claimant together with the amendments thereof.

6. Statement of the time when the trial was had and the name of the judge hearing the same. [1*]

7. Testimony on the part of the libelants taken before Francis Krull, Esq., Commissioner and in open court, during the trial of said cause, together with the exhibits filed.

8. Testimony on the part of the claimant taken at the trial of said cause, together with the exhibits filed.

9. All orders, acts and proceedings of the above-entitled court to which exceptions were made.

10. The opinion of the Court filed herein.

11. The final decree.

12. Notice of appeal.

13. Undertaking on appeal for costs and super-sedeas.

14. The assignments of error.

Dated: October 20th, 1913.

15. Exceptions to claimant's answer and ruling thereon.

CHARLES H. SOOY,

DAVID L. LEVY,

Proctors for Claimant and Appellant.

Receipt of a copy of the within Praeceptum to Clerk admitted this 23d day of October, 1913.

F. R. WALL,

Proctor for Libelants.

[Endorsed]: Filed Oct. 23, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Record.

[Statement of Clerk, U. S. District Court.]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

No. 15,401.

OSKAR JOHANSEN et al.,

Libelants.

vs.

The Steamer "ROANOKE," Her Boilers, Engines,
etc.

Respondent.

PARTIES.

Libelants: Oskar Johansen, H. Meislahn, P. Cain,
F. G. Palmer, George K. Bekker, Christen
Christensen, Alf Johnsen, A. C. Andersen, E.
Andersson, H. Andreasen, A. Fraser, O. Havness,
M. Staley, W. Kremer, V. Matson, J. Kot-
charin, C. Gibson, A. Sjogren, B. Frankel, K.
G. Clark, A. S. Caskey, S. B. Nilsen, George M.
Reed, G. W. Jacobs, A. Disher, J. E. Johnson,
W. E. Pitts, G. Drew, A. G. Clarke, J. Martin,
E. Andrews, J. Pitts, and R. Tennant. [3]

Respondent: The steamer "Roanoke," her boilers,
engines, machinery, tackle, apparel, and other
furniture.

Claimants: North Pacific Steamship Company.

PROCTORS.

For Libelants: F. R. Wall, Esquire, San Francisco,
California.

For Respondents and Claimants: C. H. Sooy, Esquire, and David L. Levy, Esquire, San Francisco, California.

April 26th, 1913. Filed verified Libel for Salvage services, etc. [4]

In the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,401.

OSKAR JOHANSEN et al.,

Libelants,

vs.

The Steamer "ROANOKE," etc.

Libel for Salvage.

To the Honorable United States District Court, in and for the Northern District of California, First Division:

The libel of Oskar Johansen, H. Meislahn, P. Cain, F. G. Palmer, George K. Bekker, Christen Christensen, Alf Johnsen, A. C. Andersen, E. Andersson, H. Andreassen, A. Fraser, O. Havness, M. Staley, W. Kremer, V. Matson, J. Kotcharin, C. Gibson, A. Sjogren, B. Frankel, K. G. Clark, A. S. Caskey, S. B. Nilsen, George M. Reed, G. W. Jacobs, A. Disher, J. E. Johnson, W. E. Pitts, G. Drew, A. G. Clarke, J. Martin, E. Andrews, J. Pitts and R. Tennant, lately composing all of the officers and crew of the steamer "Santa Clara" (except the master and chief engineer), for themselves, and on behalf of all others entitled and not pleaded, against

the steamer "Roanoke," her boilers, engines, machinery, tackle, apparel and other furniture, in a cause of salvage, civil and maritime, alleges as follows:

1. That at all of the times hereinafter mentioned, each of the above-named libelants was a seaman on board of the steamer "Santa Clara," regularly employed on board of said steamer; that said steamer was at all of said times a vessel of about 1500 tons gross register and was employed on regular voyages between Pacific Coast ports of the United States in carrying cargo and passengers between said ports and was of the value of about \$150,000.

2. That on or about the 9th day of April, 1913, the said steamer "Santa Clara" left San Francisco, in the State of California, bound for Port Harford, the port of San Luis Obispo, in said State, with each and all of said libelants on board of her and constituting her full complement of officers and crew (except as to the master and chief engineer); that about 10 o'clock in the forenoon of April 10, 1913, while said steamer was on said voyage with said

May be used as original:

C. H. SOOY and
D. L. LEVY,

Proctors for Claimant.

I consent that this copy of the libel may be used in the place and stead of the original.

F. R. WALL,
Proctor for Libelants. [5]

libelants on board of her as aforesaid and while said steamer was about one hour's run from the said port of San Luis Obispo, a wireless message was received by said steamer "Santa Clara" from the steamer "Roanoke"; that said wireless message stated that said steamer "Roanoke" was just south of Point Arguello, California, and has lost her propeller and was drifting on shore and that the wind where said "Roanoke" then was was blowing from the sea toward the shore and that the weather where said "Roanoke" then was was foggy and that said "Roanoke" was in need of assistance and asked that said "Santa Clara" come at once to the assistance of said "Roanoke"; that thereupon the course of said "Santa Clara" was changed so as to head in the direction of said Point Arguello, and said "Santa Clara" thereupon steamed in the direction of said Point Arguello for a period of about seven hours; that while steaming toward said Point Arguello as aforesaid, said steamer "Santa Clara" ran into a thick fog and that said fog continued to prevail until after the steamer "Roanoke" was taken in tow by said steamer "Santa Clara" as hereinafter stated; that when said steamer "Santa Clara" arrived off Point Arguello, said steamer "Roanoke" was found lying at an anchor about half or three-quarters of a mile from the shore near Point Arguello; that said steamer "Roanoke" was then and there in great danger because of the facts that she had lost her propeller [6] and was without any means of propulsion or control and that the wind was blowing on shore and that the winds where she then was are

apt to blow with great violence during the month of April, and that heavy weather was likely to be experienced by her at any time, and that the place where said "Roanoke" was at anchor was an exposed and open place in about 20 fathoms of water, and that the coast to the north of said "Roanoke" was rocky and dangerous and the coast to the eastward of said "Roanoke" was an open exposed beach and that there was then and there a thick fog prevailing; that because of the thick fog then and there prevailing, and that had prevailed, navigation was dangerous for the steamer "Santa Clara" and because of said fog said "Santa Clara" came dangerously near colliding with said "Roanoke," to the great risk and danger of these libelants; that said "Roanoke," was taken from her said position by said "Santa Clara" and was taken in tow by said "Santa Clara" between 6 and 7 o'clock in the afternoon of said 10th of April and was towed by her in the direction of said port of San Luis Obispo, but that said "Santa Clara" arrived off said port in the night-time and was compelled to lie off said port with said "Roanoke" in tow until the next morning. That on the morning of April 11, 1913, said "Santa Clara" took the said "Roanoke" into said port of San Luis Obispo and placed said "Roanoke" in a position of safety.

3. That by reason of the rendering of the aforesaid salvage services, each of said libelants is entitled to be awarded by this Court a substantial sum as salvage for the services rendered by each of said libelants in salving said "Roanoke" as aforesaid,

that the value of said "Roanoke" at the time she was salved and brought into a port of safety as aforesaid was about the sum of \$325,000; that each of said libelants ask that this Court award to each of them such proportion of the gross amount awarded for [7] said salvage as to this Court may seem meet and proper in the premises.

4. That said steamer "Roanoke" is now in the port of San Francisco and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

5. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, each of said libelants prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said steamer "Roanoke," her boilers, engines, machinery, tackle, apparel and other furniture, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer, upon oath, all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree such a sum of money or proportion of the value of the said steamer "Roanoke," her boilers, engines, machinery, tackle, apparel and other furniture, to each of said libelants and others, salvors, as a compensation for their salvage services, as shall seem meet and reasonable, together with their costs and expenses in this behalf sustained; and that the said steamer "Roanoke," her boilers, engines, ma-

chinery, tackle, apparel and other furniture, may be condemned and sold to pay the same; and that each of said libelants may have such other and further relief as in law and justice he may be entitled to receive.

F. R. WALL,
Proctor for said Libelants. [8]

State of California,
City and County of San Francisco,—ss.

F. G. Palmer, being first sworn, deposes and says: That he is one of the persons named as the libelants in the above and foregoing libel; that he has read said libel and knows the contents thereof, and that the same is true of his own knowledge.

F. G. PALMER.

Subscribed and sworn to before me this 26th day of April, 1912.

.....

[Endorsed]: Filed Sep. 26, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [9]

Monition and Return of U. S. Marshal.

Northern District of California,—ss.

The President of the United States of America,
to the Marshal of the United States for
[Seal] the Northern District of California,
Greeting.

Whereas, a Libel hath been filed in the District Court of the United States for the Northern District of California, on the 26th day of April, in the year

of our Lord, one thousand nine hundred and thirteen.

By Oskar Johansen et als., against The Steamer "Roanoke," etc., her tackle, apparel and furniture, in a cause of libel for salvage, civil and maritime for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said vessel, her tackle, etc., may for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libelant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the Northern District of California, on the 13th day of May, A. D., 1913, at 10 o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, [10] otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf.

And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS, the Hon. WM. C. VAN FLEET, Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 26th day of April, in the year of our Lord, one thousand nine hundred and thirteen, and of our independence, the one hundred and 37th.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

F. R. WALL,
Proctor for Libelant.

MARSHAL'S RETURN.

In obedience to the within Monition, I attached the steamer "Roanoke" therein described, on the 28th day of April, 1913, and have given due notice to all persons claiming the same that this Court will, on the 13th day of May, 1913 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named steamer "Roanoke."

I further return that I served the within Monition by handing to and leaving with, Richard Dickson, Captain and Master in [11] charge, of the said steamer "Roanoke" a copy of this Monition at the Union Iron Works, on the Bay of San Francisco, in

the city of San Francisco, Cal.

This, 28th day of April, 1913.

C. T. ELLIOTT,

United States Marshal.

By I. W. Grover,

Office Deputy.

[Endorsed]: Filed May 1, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [12]

*In the District Court of the United States of
America, Northern District of California.*

IN ADMIRALTY—No. —

OSKAR JOHANSEN et al.,

Libelants,

vs.

The Steamer "ROANOKE," etc.

Claim of North Pacific Steamship Co.

To the Honorable WM. C. VAN FLEET, Judge of
the District Court of the United States for the
Northern District of California:

The claim of North Pacific Steamship Company to
the steamer "Roanoke," her tackle, apparel and fur-
niture, now in the custody of the Marshal of the
United States for the said Northern District of Cal-
ifornia, at the suit of Oskar Johansen alleges—

That North Pacific Steamship Co., the true and
bona fide owner of the said steamer "Roanoke," her
tackle, apparel and furniture, and that no other per-
sons is owner thereof.

Wherefore th. . claimant. . prays that this Honor-

able Court will be pleased to decree a restitution of the same to North Pacific Steamship Co. and otherwise right and justice to administer in the premises.

NORTH PACIFIC STEAMSHIP CO.

By C. H. SOOY,
Attorney in Fact.

————— deposes and says that he was and is the master of said vessel, and that at the time of the said arrest thereof, he was in possession of the same as the lawful bailee thereof for the said owner., and that said owner.. reside.. out of the said Northern [13] District of California, and more than one hundred miles from the city of San Francisco, in said District.

C. H. SOOY,
Proctor for Claimant.

Northern District of California,—ss.

Subscribed and sworn to before me this 28th day of April, A. D. 1913.

[Seal] FRANCIS KRULL,
Deputy Clerk U. S. District Court Northern District of California.

[Endorsed]: Filed Apr. 28, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY—No. —

OSKAR JOHANSEN et al.,

Libelants,

vs.

The Steamer "ROANOKE," etc.

Stipulation for Release of Vessel.

Whereas a libel was filed in the above-entitled court, on the 26th day of April, 1913, by Oskar Johansen and others, against the steamer "Roanoke," etc., for the reasons and causes in said libel mentioned, it is now stipulated and agreed that upon the claimant of said vessel giving the usual admiralty stipulation, pursuant to the rules and practice of this Court conditioned to appear in the suit and abide by all orders of the Court, interlocutory or final, in the cause, and to pay all damages awarded by the final decree rendered therein, in the sum of three thousand dollars (\$3,000), with the Illinois Surety Company as surety, that the said steamer "Roanoke," attached under process issued in pursuance of the prayer of the said libel, may be released from said attachment and restored to the claimant of said vessel.

F. R. WALL,

Proctor for Libelants.

[Endorsed]: Filed Apr. 28, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [15]

No. 15,401.

*District Court of the United States for the Northern
District of California, First Division.*

IN ADMIRALTY.

Stipulation.

(STIPULATION—BOND—FOR RELEASE.)

Entered into *in* pursuant to the Rules of Practice
of This Court.

WHEREAS, a Libel was filed on the 26th day of April, in the year of our Lord one thousand nine hundred and thirteen, by Oskar Johansen et al., against The Str. "Roanoke," etc., for the reasons and causes in the said Libel mentioned; and, whereas, the said Str. is in the custody of the United States Marshal, under the process issued in pursuance of the prayer of said libel, and whereas the said steamer has been claimed by North Pacific Steamship Company; and, whereas, it has been stipulated that said steamer "Roanoke," etc., may be released from arrest upon the giving and filing of an Admiralty Stipulation in the sum of Three Thousand (\$3,000) dollars, as appears from said Stipulation now on file in said Court; and the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the claimant or their sureties, execution for the above amount may issue against their goods, chattels and lands:

NOW, THEREFORE, the condition of this Stipulation is such, that if the stipulators undersigned

shall at any time, upon the Interlocutory or final Order or Decree of the said District Court, or of any Appellate Court to which the above-named suit may proceed, and upon notice of such Order or Decree, to C. H. Sooy, Esquire, Proctor for the Claimant of said Str. "Roanoke," etc. abide by and [16] pay the money awarded by the final Decree rendered by the Court or the Appellate Court if any appeal intervene, then this Stipulation to be void, otherwise to remain in full force and virtue.

NORTH PACIFIC STEAMSHIP CO.

By C. H. SOOY,

Attorney in Fact.

ILLINOIS SURETY COMPANY,

By CHARLES T. HUGHES,

Its Attorney in Fact.

[Seal]

Taken and acknowledged this 28th day of April, 1913, before me.

[Seal]

FRANCIS KRULL,

United States Commissioner, Northern District of California.

Northern District of California,—ss.

Charles T. Hughes, as the atty. in fact for Illinois Surety Company, party to the above stipulation, being duly sworn, depose and say, for himself, that the Illinois Surety Company is worth the sum of Five Hundred Thousand (\$500,000) dollars over and above all his just debts and liabilities.

CHARLES T. HUGHES,

Atty. in Fact for Illinois Surety Co.

Sworn to this 28th day April, 1913, before me,
[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of
California.

[Endorsed]: Filed the 28th day of Apr. 1913. W.
B. Maling, Clerk. By Francis Krull, Deputy Clerk.
[17]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,401.

OSKAR JOHANSEN et al.,

Libelants,

vs.

The Steamer "ROANOKE," etc.

**Answer of Claimant North Pacific Steamship
Company to Libel for Salvage.**

The answer of North Pacific Steamship Company, a corporation, claimant herein, to the libel of Oskar Johansen et al., vs. The Steamer "Roanoke," her boilers, engines, etc., in a cause of salvage against said ship, alleges and denies as follows:

I.

Claimant avers that it has no knowledge or information sufficient to form a belief as to the allegations contained in Article I of said libel, to wit:

"That at all the times hereinafter mentioned each of the above-named libelants was a seaman on board of the steamer 'Santa Clara' regularly employed on board of said steamer";

And therefore neither admits nor denies the same but leaves said allegation to be proved by said libelants as they may be able to do so and as they may be advised, except that as to libelants B. Frankel, J. E. Johnson, W. E. Pitts, G. Drew, A. G. Clarke, J. Martin, E. Andrews, J. Pitts and R. Tenant, claimant alleges that said B. F. Frankel was at [18] the times mentioned in said libel, purser on board of said steamer and said other libelants last mentioned were at said times stewards on board of said steamer.

II.

Upon the same ground as above stated, and with the exceptions above set forth, claimant neither admits nor denies the allegations contained in Article II of said libel, that each and all of said libelants were on board of said steamer "Santa Clara," and constituted her full complement of officers and crew (except as to the Master and Chief Engineer), but leaves said allegations to be proved by said libelants as they may be able to do so and as they may be advised.

III.

Denies that the wireless message alleged to have been received by said steamer "Santa Clara" from said steamer "Roanoke" stated that said steamer "Roanoke" was drifting on shore or that the wind where said steamer "Roanoke" then was was blowing from the east toward the shore or that the weather where said steamer "Roanoke" then was, was foggy or that said alleged message contained any statement of such character or import, or that

said statements so alleged to have been contained in said message or any statement of such character or import, were facts.

IV.

Denies that said steamer "Santa Clara" thereupon or at any time, or at all, steamed in the direction of said Pt. Arguello for a period of about seven hours or for any period longer than six hours.

V.

As to the allegations contained in said libel that [19] while steaming toward said Pt. Arguello, said steamer "Santa Clara" ran into a thick fog and that said fog continued to prevail until after said steamer "Roanoke" was taken in tow by said steamer "Santa Clara," claimant avers that from the time when said steamer "Santa Clara" received said alleged message from said steamer "Roanoke" until about 3:30 of said afternoon of April 10th, 1913, and while said steamer "Santa Clara" was proceeding toward Pt. Arguello, said steamer "Santa Clara" encountered nothing but clear and calm weather and smooth seas, and during said time said steamer "Santa Clara" encountered no thick fog whatsoever, and claimant denies that said steamer "Santa Clara" ran into a thick or any fog at any time prior to 3:30 o'clock in the afternoon of said day, or that said or any fog prevailed or continued to prevail at all prior to that time.

VI.

Denies that when said steamer "Santa Clara" arrived off Pt. Arguello said steamer "Roanoke" was found lying at anchor about $\frac{1}{2}$ or $\frac{3}{4}$ of a mile from

the shore near Pt. Arguello or at any distance from said shore less than $1\frac{1}{2}$ miles, or that said steamer "Roanoke" was so lying at the distance alleged or at any distance from said shore, less than about $1\frac{1}{2}$ miles.

VII.

Denies that said steamer "Roanoke" was then and there, or at any time, or at all, in great or any danger because of the facts alleged in said libel or because of any facts whatever, or for any reason whatever.

VIII.

Denies that the wind was blowing on shore or that the winds where said steamer "Roanoke" then was are apt to [20] blow with great or any violence during the month of April, or that heavy weather was likely to be experienced by said steamer "Roanoke" at any time, and in this connection libelant avers that the weather which prevailed at said time and at said place was calm and the sea smooth and showed every indication of remaining so.

IX.

Denies that navigation was dangerous for said steamer "Santa Clara" for the reasons alleged in said libel or for any reason whatever; denies that said steamer "Santa Clara" came dangerously, or at all, near colliding with said steamer "Roanoke" to the great or any risk or danger of said libelants or any of them, for the reasons alleged in said libel or for any reason whatever, and in this behalf claimant avers that said steamer "Santa Clara" was proceeding at a speed of less than 8 miles per hour;

that the whistle of said steamer "Roanoke" was being blown continuously and could be heard and was heard by said "Santa Clara" for a period of half an hour before said "Santa Clara" reached the place where said "Roanoke" was at anchor; that at no time did said "Santa Clara" come up to any distance less than four or five hundred feet from said "Roanoke."

X.

Denies that the acts and things alleged in said libel to have been done constituted salvage services, or that by reason thereof, each or any of said libelants is entitled to be awarded by this Court a substantial or any sum as salvage for the services alleged to have been rendered by each or any of them; denies that any services whatever were rendered by each or any of said libelants in salving said [21] "Roanoke," and in this connection claimant avers that the tow lines and towing gear used in towing said "Roanoke" belonged to said "Roanoke," and that said lines were taken in a rowboat by members of the crew of said "Roanoke" to said "Santa Clara," and that the only services performed by any member of the crew of said "Santa Clara" in this connection was to make said tow line fast; that said service was slight and unimportant and involved no danger or risk whatever to said libelants or any of them, except as to that hereinabove alleged, required no services whatever to be performed; that said "Roanoke" lay in the course of said "Santa Clara."

XI.

Denies that the value of said "Roanoke" at the

time she is alleged to have been salved and brought into a port of safety was about the sum of \$325,000.00, or any sum greater than \$150,000.00.

XII.

Claimant avers that both said steamer "Roanoke" and said steamer "Santa Clara" are and at all the times in said libel mentioned were owned, maintained and operated by this claimant and were associated ships and members of the same fleet visiting ports along the Pacific Coast for the purpose of carrying freight and passengers, passing and repassing each other in the course of their voyages; that each vessel of the fleet to which said steamers belong and at said times belonged are and at all said times for a long time prior thereto, have been instructed to render assistance of every kind and character to other vessels of said fleet whenever necessary; that said steamer "Santa Clara" was expressly ordered by this claimant to render assistance to said "Roanoke" [22] and all and any acts or things done or alleged to have been done by said "Santa Clara" by way of assistance to said "Roanoke" were rendered under and in compliance with the express order and command of this claimant.

XIII.

That it is and since a long time prior to the 10th day of April, 1913, has been mutually understood by seamen in the employ of claimant on board of vessels belonging to this claimant, including said "Roanoke" and said "Santa Clara," and it was at all said times among said seamen a well-established usage that the wages paid to and received by them from this claim-

ant were paid and received as full and complete compensation for any and all services performed by them for this claimant, or at the command or request of this claimant or its duly authorized agent, irrespective of the particular vessel for or upon which such services might be performed, or whether such services were performed in rendering assistance to vessels belonging to this claimant other than that upon which such seamen might be employed; that in recognition of such understanding and usage, the Captain and Chief Engineer of said "Santa Clara," who were such at the times alleged in said libel, have made no claim for salvage, have disclaimed all intention of making such claim and have denied the existence of any ground therefor.

WHEREFORE claimant prays that the libel be dismissed.

Dated: June 11th, 1911.

C. H. SOOY,

DAVID L. LEVY,

Proctors for Claimant. [23]

State of California,

City and County of San Francisco,—ss.

Chas. P. Doe, being first duly sworn, deposes and says: That he is an officer, to wit: President of the North Pacific Steamship Company, claimant in the above-entitled action, and makes this affidavit for and on behalf of said company; that he has read the foregoing answer to Libel and knows the contents thereof and that the same is true of his own knowledge.

CHAS. P. DOE.

Subscribed and sworn to before me this 11th day of June, 1913.

[Seal]

EUGENE W. LEVY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jun. 11, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [24]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,401.

OSKAR JOHANSEN et al.,

Libelants,

vs.

The Steamer "ROANOKE," etc.

Exceptions to Answer.

The libelants in the above-entitled libel hereby except to the answer of claimant in said Libel, as follows:

First. That all of said answer, from line 18 on page 1 thereof down to and including the word "advised" in line 27 on said page 1, is neither relevant nor pertinent, and that the same is scandalous and insufficient.

Second. That article numbered "II," on page 2, of said answer, and each and every part of said article, is neither relevant nor pertinent, and that the same is scandalous and insufficient.

In which particulars the libelants insist that the claimant's answer is irrelevant, impertinent, scan-

dalous and insufficient.

WHEREFORE, said libelants except thereto, and pray that the parts of said answer excepted to be expunged with costs to said claimant, and that said claimant be compelled to file a further relevant, pertinent and sufficient answer.

F. R. WALL,

Proctor for Libelants.

Received a copy of the within exceptions to answer this 19th day of June, 1913.

C. H. SOOY and

D. L. LEVY,

Proctors for Claimants. [25]

[Endorsed]: Filed Jun. 19, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [26]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 19th day of August, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,401.

JOHANSON

vs.

Str. "ROANOKE," etc.

Order Submitting Exceptions to Answer.

The exceptions to the answer herein this day came on for hearing and after hearing proctors, by the

Court ordered that said exceptions stand submitted to the Court for determination. [27]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San Francisco, on Thursday, the 21st day of August, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,401.

OSKAR JOHANSEN et al.,

vs.

Str. "ROANOKE," etc.

Order Sustaining Exceptions to Answer of Claimant.

The exceptions to the Answer herein having been heretofore submitted to the Court for decision, now, after due consideration had by the Court, ordered that said exceptions be and the same are hereby sustained: Further ordered that respondent be and is hereby granted five days to amend if so advised.

[28]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,401.

OSCAR JOHANSEN et al.,

Libelants,

vs.

The Steamer "ROANOKE," etc.

**Amendment to Answer of Claimant North Pacific
Steamship Company to Libel for Salvage.**

Now comes North Pacific Steamship Company, a corporation, claimant herein, and by leave of court first had and obtained files this its amendments to its answer to the libel of Oskar Johansen et al., vs. The Steamer "Roanoke," her boilers, engines, etc., in a cause of salvage now on file herein, and denies as follows:

I.

Claimant denies that at all the times in said libel mentioned, or at any time, or at all, each or any of the libelants was a seaman on board the steamer "Santa Clara" or regularly or at all employed on board of said steamer, except that as to libelants B. Frankel, J. E. Johnson, W. E. Pitts, G. Drew, A. G. Clarke, J. Martin, E. Andrews, J. Pitts and R. Tenant, claimant alleges that said B. F. Frankel was at the times mentioned in said libel purser on said steamer and that said other libelants last mentioned were at said times stewards on board of said steamer.

II.

Denies that each or all or any of said libelants were on board of said steamer or constituted her full or any complement of officers or crew (except as to the Master and Chief Engineer) on the day alleged in said libel, or any time, or at all.

Wherefore, claimant prays that the libel be dismissed.

CHAS. H. SOOY and
DAVID L. LEVY,
Proctors for Claimant.

State of California,

City and County of San Francisco,—ss.

Chas. H. Sooy, being first duly sworn, deposes and says: That he is an officer, to wit: Assistant Secretary of the North Pacific Steamship Company, claimant in the above-entitled action, and makes this affidavit for and on behalf of said company; that he has read the foregoing answer to Libel and knows the contents thereof and that the same is true of his own knowledge.

C. H. SOOY,
Asst. Secretary.

Subscribed and sworn to before me this 26th day of August, 1913.

[Seal]

E. W. LEVY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 28, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [30]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 16th day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,401.

OSKAR JOHANSEN et al.

vs.

Str. "ROANOKE," etc.

Minutes of Trial.

This cause this day came on for hearing, F. R. Wall, Esq., appearing as proctor for libelant, and Messrs. C. H. Sooy and David Levy, appearing as proctors for claimant; Mr. Wall stated the case and introduced in evidence the testimony taken on reference before a United States Commissioner, and called Thomas Geruderson, Richard Dixon, G. M. Jessen, who were each duly sworn and examined for libelant.

Mr. Sooy recalled Richard Dixon as a witness on behalf of claimant, and also recalled G. M. Jessen as a witness on behalf of claimant, and called Charles P. Doe, who was duly sworn and examined as a witness on behalf of claimant. Claimant introduced certain exhibits, which were marked Claimant's Exhibits "A" and "B," respectively. The case was then continued until September 20th, 1913, at 9 o'clock A. M., for argument. [31]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San Francisco, on Saturday, the 20th day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,401.

OSKAR JOHANSEN et al.

vs.

Str. "ROANOKE," etc.

Order Submitting Cause.

This cause this day came on for argument and after hearing F. R. Wall, Esq., in behalf of libellant and C. H. Sooy, Esq., in behalf of claimant, by the Court ordered this cause be and the same is hereby submitted to the Court for decision. [32]

In the District Court of the United States, in and for the Northern District of California, First Division.

Hon. M. T. DOOLING, Judge.

OSKAR JOHANSEN et al.,

Libelants,

vs.

The Steamer "ROANOKE," etc.,

Claimant.

Testimony Taken in Open Court.

September 16th, 1913—September 20th, 1913.

APPEARANCES.

F. R. WALL, Esq., for the Libelants.

C. H. SOOY, Esq., and DAVID LEVY, Esq., for the Claimant. [33*—1†]

Mr. WALL.—If the Court please, this is a libel *in rem* against the steamer “Roanoke” by the officers and crew of the “Santa Clara” with the exception of the master and first officer, chief steward and perhaps one or two others who do not join in the libel. I will not take the time of the Court in reading the pleadings, but I will state that in a general way the facts are that the “Santa Clara,” while on her way from San Francisco to San Luis Obispo, leaving San Francisco on the 9th of April, and while within about one hour and a half steaming of San Luis Obispo, received a wireless message from the “Roanoke” stating that the “Roanoke” had lost her propeller and was in need of assistance, and the “Santa Clara” then changed her course and instead of proceeding to her destination, San Luis Obispo, proceeded to the southward and found the “Roanoke” at anchor about a mile and a half to the south of Point Arguello with her tail-shaft broken and both blades of the propeller broken, with a moderate westerly wind, and took her in tow, and towed her up to San Luis Obispo, where she was

*Page-number appearing at foot of page of certified Apostles.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Apostles.

anchored and later turned over to the "Sea Rover." The answer of the claimant—

Mr. LEVY.—If I may interrupt counsel for a moment, your Honor will remember that certain exceptions to the original answer were sustained and we took the leave that your Honor entered to amend and file the amendments. Since that time we have drafted the answer in an amended form including the original answer and the amendments subsequently filed, so instead of the original answer and amendments and so forth we would like to file now an amended answer.

The COURT.—Does it change it any?

Mr. LEVY.—Not at all except the statutes; we desire [34—2] to plead the statute of the State of California, Section 2079 of the Civil Code of the State of California, which has application to the matter of salvage and we desire to plead it out of an abundance of caution because in the cases I found I have not found any which hold that the District Court sitting as a Court of Admiralty can take judicial notice of the Statutes of the State.

The COURT.—Is there any objection in filing it?

Mr. WALL.—Yes, it should not have been delayed until this time. The rule in the Admiralty Court is that an amended pleading is never filed, but the amendment to the pleading is put in, and there has been ample time not to spring this at the eleventh hour and fifty-ninth minute.

Mr. LEVY.—It is merely pleading a matter of law out of an abundance of caution, and I found cases which say the federal courts do take judicial

notice of the laws of various States.

Mr. WALL.—It is fundamental they do.

Mr. LEVY.—And further they administer the laws of the various States; in other words, it seems to have in contemplation a case where the citizen of one state is suing a citizen of the other state and the federal courts take jurisdiction by reason of the diverse citizenship of the parties.

THE COURT.—The Court will take knowledge of the statute.

Mr. WALL.—We will stipulate if necessary that the Court can do so.

THE COURT.—The filing will not be permitted.

Mr. WALL.—That the Court can take judicial notice [35—3] is elemental and fundamental.

THE COURT.—I understand. All that you want to do is to get that statute before the Court.

Mr. LEVY.—Yes.

Mr. WALL.—After the denial the claimant sets out that the two vessels were owned by the same owner, the North Pacific Steamship Company. “That each vessel of the fleet to which said steamers belong and at said times belonged, are and at all said times for a long time prior thereto, have been instructed to render assistance of every kind and character to other vessels of said fleet whenever necessary; that said steamer ‘Santa Clara’ was expressly ordered by this claimant to render assistance to said ‘Roanoke’ and all and any acts or things done or alleged to have been done by said ‘Santa Clara’ by way of assistance to said ‘Roanoke’ were rendered under and in compliance with the express

order and command of this claimant.

“That it is and since a long time prior to the 10th day of April, 1913, has been mutually understood by seaman in the employ of claimant on board of vessels belonging to this claimant, including said ‘Roanoke’ and said ‘Santa Clara,’ and it was at all said times among said seamen a well-established usage that the wages paid to and received by them from this claimant were paid and received as full and complete compensation for any and all services performed by them for this claimant, or at the command or request of this claimant or its duly authorized agent, irrespective of the particular vessel for or upon which such services might be performed, or whether such services were performed in rendering assistance [36—4] to vessels belonging to this claimant other than that upon which such seaman might be employed; that in recognition of such understanding and usage, the Captain and Chief Engineer of said ‘Santa Clara,’ who were such at the times alleged in said libel, have made no claim for salvage, have disclaimed all intention of making such claim and have denied the existence of any ground therefor.” That, in a general way are the issues and state of the pleadings. Do you wish to make any further opening statement at this time?

Mr. LEVY.—I think not.

Mr. WALL.—I will say that a large part of the testimony of the libelant has been taken, your Honor, before the Commissioner and I will now offer that testimony on behalf of the libelants so taken in evidence. I will call Captain Gunderson.

[Testimony of Thomas Gunderson, for Libelants.]

THOMAS GUNDERSON, called for the libelants, sworn.

Mr. WALL.—Q. Give your name and occupation, please, Captain.

A. Thomas Gunderson; pilot of the fire boat, San Francisco pilot at the present time.

Q. What papers do you hold?

A. Unlimited master's license.

Q. How long have you been going to sea?

A. Since I was 14 years; 36 years.

Q. How long have you been going to sea on this coast as master? A. Since 1890.

Q. During your experience as master have you gone up and down the coast to the south of San Francisco passing Point [37—5] Arguello?

A. Yes, sir, all that time.

Q. How many times have you been up and down by Point Arguello?

A. Oh, four or five hundred times.

Q. Have you ever been inshore near Point Arguello with any vessel, near there?

A. I have never been inshore; I have been very close to the shore.

Q. Have you ever been near there while you have had to discharge cargo?

A. At Surf, I discharged lumber between Arguello and Conception.

Q. Conception is to the south of Point Arguello?

A. Yes, sir, 13 miles.

Q. In going up and down by Arguello have you

(Testimony of Thomas Gunderson.)

been able to acquire any information as to the nature of the coast from Point Arguello to the southward?

A. From Arguello to about three miles south is a very rocky coast.

Q. How is it off Point Arguello?

A. Very rocky.

Q. Off Rocky Point?

A. It is rocky all along there about three miles distance. There is a reef about one-half mile off of Rocky Point.

Q. Do you know the steamer "Roanoke"?

A. I do.

Q. I will ask you first before that, Captain, how does the anchorage on the coast—how does the coast from Point Arguello to about a mile and a half or two miles to the southward compare with other points on the coast as a safe part of the coast?

A. I consider it one of the most dangerous parts of the Pacific Coast.

Q. If the steamer "Roanoke" were at anchor a mile and a half to the south of Point Arguello in a fog with a moderate [38—6] swell setting from the westward to the eastward and with her tail shaft broken, what would you say would be her position as to a position of safety, or one of danger?

Mr. SOOY.—Objected to as assuming something that is not in evidence, and no proper foundation being laid for the question.

Mr. WALL.—The evidence has already been offered, if your Honor please.

The COURT.—I have not seen it.

(Testimony of Thomas Gunderson.)

Mr. SOOY.—It does not include all the facts.

The COURT.—Are all the facts included. Is it true she was anchored in the fog. Is there any testimony that she was anchored in the fog?

Mr. SOOY.—Yes.

The COURT.—A mile and a half or two miles to the south from Point Arguello?

Mr. SOOY.—Yes.

The COURT.—With her tail shaft broken?

Mr. SOOY.—Yes.

The COURT.—With a moderate swell?

Mr. SOOY.—Yes.

The COURT.—That is all that has been included in the question.

Mr. SOOY.—There is one fact left out. It appeared in the testimony that there was a light north-west wind.

Mr. WALL.—Q. I will add “with a light or moderate westerly or northwest wind” to the question.

A. I consider she is in a dangerous position.

Q. What is the nature of the holding ground, if you know, [39—7] southward of Point Arguello about a mile and a half or two miles in 14½ fathoms or in that locality?

A. The chart says it is a sandy bottom there, not very good holding ground.

Q. From your experience what is the fact as to swells being experienced in that locality, as to their springing up?

A. Well, sometimes it springs up pretty rapidly.

Mr. WALL.—That is all.

(Testimony of Thomas Gunderson.)

Cross-examination.

Mr. SOOY.—Q. Captain, you say you have been up and down the coast of California you think 500 times? A. Yes, sir.

Q. And in your capacity as master of different steam schooners on this coast? A. Yes, sir.

Q. You say that the holding ground in the ocean three miles south of Point Arguello is not good holding ground. You mean by that, I presume, that the anchor will not hold in that kind of ground; is that true?

A. I do not consider a sandy bottom good holding ground.

Q. You say that particular ground is not good holding ground. By that you mean the anchor will not hold in that kind of ground. Is that what you mean? A. Yes, sir.

Q. Did you ever have occasion to drop your anchor in any of that stretch of ocean-bed there three miles south of Point Arguello? A. No, sir.

Q. Then, just how do you know, Captain, the character of the ocean-bed there?

A. I said the chart gives it a sandy bottom. I do not know it, I said the chart gives [40—8] it.

Q. In your opinion, Captain, is there any difference between sandy bottoms. Can there be different kinds of sandy bottoms, or are they all alike in your opinion? A. I guess there is a difference.

Q. There is a difference? A. Yes, sir.

Q. Did you say the sandy bottom down there is any different from any other sandy bottom, or not?

(Testimony of Thomas Gunderson.)

A. I did not say it was any different.

Q. So that all you know, then, Captain, about whether or not an anchor will hold in that particular stretch of beach is from what you have gleaned from the Government chart; is it not, from the fact it is a sandy bottom—is that true? A. Yes, sir.

Q. That is all the knowledge you have on the subject? A. Yes, sir, on that particular place.

Q. About three miles south of Point Arguello?

A. Yes, sir.

Q. If you were told, Captain, that the “Roanoke” had her starboard anchor over within three miles of Point Arguello and that one anchor did hold the vessel for some 10 or 12 hours would you be surprised at that, or would you think that the starboard anchor of the “Roanoke” would hold her in?

A. No, sir, I would not be surprised.

Q. You would not be surprised? A. No, sir.

Q. What do you call good holding ground, Captain? A. Clay, clay bottom.

Q. Any rock in it?

A. If it is rock it is good holding ground too. If your anchor has hold of rock you will break the [41—9] anchor before the holding ground will go.

Q. Then you would say that a rock ocean-bed combined with clay would not be so good as a sandy bottom in so far as its holding qualities are concerned? A. It would be better.

Q. The rock and clay would be better?

A. Yes, sir.

Q. Are you familiar with any of the anchorages

(Testimony of Thomas Gunderson.)

along the coast outside of this stretch of land that you have testified to?

A. Well, I have anchored a good many places along the coast.

Q. Where?

A. I anchored about 8 miles below Point Arguello unloading a cargo of lumber.

Q. At what point?

A. It is about eight miles south of Arguello. It don't have any particular name.

Q. Was that a sandy bottom or rock?

A. Rock, I broke my anchor.

Q. You did break your anchor? A. Yes, sir.

Q. Did you ever anchor in sandy bottoms along there?

A. No, sir, I anchored below Point Conception; that is a sandy bottom, but it is more sheltered.

Q. Is it not a fact in Monterey County, or Watsonville or Santa Cruz, in places like that the anchors hold better after they have become buried in the sand than they do in places where anchors cannot take hold?

A. I understand it is quicksand in Monterey, the anchor gets buried.

Q. So where sand is shifting sand that makes the best ground, holding ground? A. I guess so.

Q. If the sand below Point Arguello were the same kind of [42—10] sands as found in Monterey Bay then you would say it would be good holding ground?

A. I do not know if it is the same kind.

(Testimony of Thomas Gunderson.)

Q. If it were the same kind you would say it was good holding ground? A. Yes, sir.

Q. You know, as a matter of fact, you can put one anchor over, the starboard or port anchor any place in Monterey Bay and that the tide washing up and down will bury that anchor and it finds the best kind of holding ground. As a seafaring man you know that? A. It holds.

Q. And that is the best kind of holding ground?

A. Yes, sir.

Q. I want to ask you this question. You have stated if the "Roanoke," which vessel I understand you to testify you are acquainted were anchored with her starboard anchor one mile and a half off-shore and one mile and a half or two miles below Point Arguello you would say the vessel was in a dangerous position. That is your statement, is it not? A. Yes, sir.

Q. Why do you say she would be in a dangerous position?

A. If it blows up a strong northwest wind or there is a swell she cannot get out of there without assistance.

Q. Then would you say that those are the only reasons of her being in danger. That is the only reason she would be in danger, is it not, the question of swell or wind? A. Yes, sir.

Q. Those two reasons? A. Yes, sir.

Q. Now, then, if no wind sprang up, Captain, and no swell came up from the west, the vessel then would

(Testimony of Thomas Gunderson.)

not be in any [43—11] danger, would she?

A. Not as long as the anchor would hold.

Q. As long as her anchor held, no wind sprang up, no swell came from the west that vessel is in no more danger than she would be in any other place along the coast? A. I think so.

Q. Have you ever been north of Point Arguello on the Pacific Coast? A. Yes, sir, I have.

Q. All up and down the coast, have you not?

A. Yes, sir.

Q. Do you know where Point Buchon is?

A. Yes, sir.

Q. Do you know a place five or six miles from Point Buchon where there is a bluff beach and many rocks jutting out of the ocean?

A. Pescadero Point.

Q. Yes, along in there? A. Yes, sir.

Q. Would you say that is a dangerous beach or would you say it is not so dangerous?

A. I think that is another dangerous place; a mean place.

Q. Is it not a fact that is considered one of the worse stretches along this coast by seafaring men?

A. That all depends what position you get in there. You have no right to get in so close there.

Q. Of course, no place is dangerous unless you get on the rocks. You are never in any danger until you get on the rocks?

A. You are in danger before you get on the rocks.

(Testimony of Thomas Gunderson.)

It is too late, your danger is all over when you are on the rocks.

Q. Is that a dangerous coast along there?

A. It is dangerous anywhere if you lose your propeller or shaft. You are in a bad fix as well as any other place. [44—12]

Q. You know where Surf is on the coast?

A. Yes, sir.

Q. You remember the ill-fated "Santa Rosa"?

A. Yes, sir, I was there when she went ashore.

Q. I thought so. There are not any rocks there, are there? A. Sure.

Q. Where the vessel went ashore? A. Yes, sir.

Q. Are they sticking up out of the ocean?

A. Not very much.

Q. That is mostly sand? A. Rock bottom.

Q. There is sand on the beach? A. Yes, sir.

Q. That is north of Point Arguello?

A. Yes, sir.

Q. Could you imagine any place on the coast of California that would be any worse for vessels to go ashore than Surf? A. Oh, yes.

Q. You remember the "Santa Rosa" wreck, don't you? A. Yes, sir, I saw it.

Q. Can you imagine anything that could happen any worse to a vessel than have her break in two?

A. Yes, sir, she stood there all day.

Q. Did she break that day? A. Yes, sir.

Q. Could anything happen worse to a vessel than that?

(Testimony of Thomas Gunderson.)

A. She could not knock all to pieces in a couple of hours.

Q. There was no sea to amount to anything that day? A. There was in the evening.

Q. There was not in the morning?

A. It was pretty smooth in the morning.

Q. So you would say there are places worse than Surf to go ashore? A. Yes, sir.

Q. If a vessel anchoring one mile or a mile and a half from [45—13] Surf with a westerly wind and a small swell running, as long as that anchor held there would be no more danger there than any other place on the coast? A. Not if she had steam.

Q. I am not asking you about that. Assume your boiler had broken down?

A. No, sir, she would be in danger.

Q. As long as her anchor held. That is what I am asking you. Is Point Arguello any worse place for a vessel to go ashore than any other of a half dozen places along the coast?

A. It is a very rocky coast. The steam schooner "Laye" went ashore there and lasted about three hours.

Q. Was there any swell?

A. Ordinary weather.

Q. You remember when the "Laye" went ashore there was a heavy sea from the west?

A. I heard she was going all to pieces; the men and crew never got anything out of her.

Q. That is quite true. Could not that happen any place out of 50 places on the coast of California?

(Testimony of Thomas Gunderson.)

A. Yes, sir; I could pick out 50 places just as bad.

Q. So you would not say it was any worse there?

A. I said it was one of the worse.

Q. There are many other places just as bad north and south? A. Yes, sir.

Q. Are you familiar with Port Harford and the coast along in there? A. Yes, sir.

Q. What would you say would happen to a vessel that was anchored with her starboard anchor out off Port Harford outside the breakwater with a westerly wind, little westerly wind and with a westerly swell if the anchor chain should part [46—14] and she would drift ashore; would you say she was in danger?

A. Yes, sir, if she had no steam.

Q. She had no steam and the anchor chain parted and she drifted inshore, she would be in danger?

A. Yes, sir.

Q. And you would say she was in a dangerous place, would you not? A. Yes, sir.

Q. Would you say she would be in any less danger than she would be in at Point Arguello?

A. Yes, sir; the coast is not so rocky around there, you have a chance to get on the sand beach when you get in. There are fewer rocks there, you are less liable to hit them there, you are more liable to get a sandy beach.

Q. If you did get a sandy bottom there with rocks around on anchoring the vessel is liable to meet with the fate of the "Santa Rosa"? A. Not in there.

Q. You do not think she would break up?

(Testimony of Thomas Gunderson.)

A. Not in Port Harford.

Q. I am speaking either side there, either north or south? A. North she would break up.

Q. And if she were right up at Port Harford without any steam with a westerly wind and she drifted in there, unless she got to shore she would break up too?

A. There is a harbor there, a breakwater.

Q. Suppose it was outside the breakwater?

A. If she hit the rocks she would break up.

Mr. SOOY.—That is all.

Mr. WALL.—Captain Dickson's testimony has already been [47—15] taken, but I want to ask him a few additional questions.

[Testimony of Richard Dickson, for Libelants.]

RICHARD DICKSON, called for the libelants, sworn.

Mr. WALL.—Q. You testified that your tail shaft broke about five minutes after 10 o'clock on the morning of the 10th of April; that is correct, is it not? A. Yes, sir.

Q. And that you anchored at 10 minutes after 11?

A. In that neighborhood,—somewhere in there.

Q. You saw the light-house, Point Arguello Light-house, somewhere between 8 and 9 o'clock before the fog shut in? A. Yes, sir.

Q. How far off was the light-house from you at the time you saw it between 8 and 9 o'clock to the best of your judgment?

A. About 12 miles, between 10 and 12 miles, I will say.

(Testimony of Richard Dickson.)

Q. And where were you when your tail shaft broke?

A. We were about, to the best of my recollection, we were about three miles south by east of Point Arguello.

Q. About three miles south by east of Point Arguello? A. Yes, sir.

Q. When you discovered that your tail shaft was broken?

A. Yes, sir, that was by my reckoning; of course, it was thick fog.

Q. Did you take any soundings immediately after your tail shaft broke? A. We did.

Q. How much water were you in right after the breaking of the tail shaft?

A. 15 fathoms. That is by this sounding we took. 17 fathoms at first; between 17 and 20 fathoms.

Q. Somewhere between 17 and 20 fathoms?

A. Yes, sir. [48—16]

Q. From that time until you came to an anchor you drifted from 17 fathoms to 14 and one-half; is that correct?

A. Fourteen and one-half fathoms when we anchored.

Q. Did you have any sail on the "Roanoke" after the tail shaft broke?

A. I had two sails, but I did not use them.

Q. You had two sails but you did not use them?

A. Yes, sir, because it was dead calm; I could not use them.

Q. After you anchored was there a breeze any

(Testimony of Richard Dickson.)

time? A. It came all the time.

Q. All the time? A. Yes, sir.

Q. What sails does the "Roanoke" have altogether? A. A jib and main sail.

Q. Just a jib and main sail? A. Yes, sir.

Q. What is the square feet of canvas?

A. That I do not exactly know; I never measured it.

Q. What is the tonnage of the "Roanoke"?

A. She is 1654 net and 2354 gross.

Q. How much horse-power would it take to give her steerageway?

A. It would not take her much to give her steerageway; 25 or 20 horse-power would give her steerageway.

Q. You could not get steerageway on her with a jib and main sail?

A. I never have tried it; she would drift sideways.

Q. It would balance her; when the jib paid her off the mainsail would bring her up in the wind and she would drift to leeward? A. Yes, sir.

Q. You said on your direct examination that when you came to anchor off Port San Luis it was about eleven o'clock in the morning?

A. To the best of my recollection it was five [49—17] minutes past eleven; from between there to 15 minutes past eleven.

Q. I am speaking of Port Harford, not Point Arguello. A. Between 5 and 6 o'clock.

Q. You came to an anchor where?

A. Outside of the breakwater of San Luis.

(Testimony of Richard Dickson.)

Q. How far were you?

A. About a mile south southeast of the breakwater.

Q. How far is that from the town?

A. Quite a distance.

Q. About how far?

A. In the neighborhood of a mile and three-quarters or two miles. There is no town there, only a hotel and a couple of houses; from the wharf, I mean, about in that neighborhood.

Q. You had a wireless on board? A. We had.

Q. In operation. There is nothing the matter with it? A. No, sir.

Q. When you anchored there did you consider that you were anchored in a safe place?

A. I did under the circumstances.

Q. And the "Sea Rover" took you in tow at what time?

A. I did not understand. Do you mean at Port San Luis?

Q. Yes.

A. I considered we were just about in the same position as we were in at Point Arguello.

Q. You considered that you were in a safe position?

A. I did if a tug had been there, but there was none.

Q. When did the tug get there?

A. She got there about 11 o'clock that forenoon.

Q. She took you in tow as soon as she got there?

A. She did.

Q. What time did the "Santa Clara" leave you?

(Testimony of Richard Dickson.)

A. Between 5 and 6 in the morning, to the best of my recollection. [50—18]

Q. After the tug "Sea Rover" took you in tow where did she take you to? A. San Francisco.

Q. Did you consider that you were in any danger at Point Arguello?

A. No more than the other place.

Q. Did you consider you were in any danger at Port Harford?

A. The two places about the same.

Q. You did not consider you were in any danger at either place?

A. I say the two places about the same.

Q. Did you consider you were in danger at either place?

A. Not under the condition of the weather we had there right along.

Cross-examination.

Mr. SOOY.—Q. When you dropped anchor on April 10th, I understand you to say it was about 10 minutes past 11 in the morning you discovered that the tail shaft of the "Roanoke" was broken?

A. Yes, sir.

Q. At that time you were bound from San Pedro to San Francisco? A. Yes, sir.

Q. As captain of that vessel? A. I was.

Q. You had how many passengers? A. 95.

Q. And you had on some cargo?

A. Yes, sir, very light though.

Q. And when you first learned that your tail shaft was broken you immediately took soundings, as I

(Testimony of Richard Dickson.)

understand it? A. Yes, sir.

Q. And you found that you had how many fathoms of water?

A. In the neighborhood of 17 fathoms of water, to the best of my recollection.

Q. Was that a little too deep to anchor? [51—19]

A. I could have anchored there, but I wanted to put a boat over and have a good look to see what the matter was; in the meantime the vessel was drifting.

Q. You put the boat over with some men in it?

A. Yes, sir.

Q. I understand. You permitted your boat to drift a little towards shore? A. Yes, sir.

Q. How far?

A. I do not remember how far. We drifted until we got in 14½ fathoms of water, and we lay there.

Q. The "Roanoke" was south of Point Arguello?

A. Yes, sir.

Q. About how far?

A. To the best of my belief and judgment—I could listen to the whistle, I did not see the point at any time from the time we anchored, to the best of my judgment we should be probably two miles or a mile and a half south by east of Point Arguello, according to the whistle of my ear.

Q. Were you in the regular course of vessels between San Pedro and San Francisco at the time the tail shaft of the "Roanoke" was broken?

A. Absolutely on the course.

Q. So that then you drifted in an easterly direction towards the coast before you dropped your

(Testimony of Richard Dickson.)

anchor? A. We did.

Q. And you drifted for how long approximately?

A. From five minutes past 10 to the best of my recollection until quarter past 11.

Q. In that time did you drift a mile and a half or two miles? A. No, sir.

Q. How much? A. A very short distance.

Q. Did you drift one-half a mile?

A. It would not be that much. [52—20]

Q. It would not exceed one-half a mile?

A. No, sir.

Q. After you had dropped your anchor, Captain, you were then out of the regular path of the regular course of vessels between San Francisco and San Pedro, were you not?

A. No, sir, the steamer was going right by us, alongside the outside of us and one steamer went inside of us during the time we lay to anchored, just a little before the "Santa Clara" came to us.

Q. Of course, that was after you commenced whistling? A. Yes, sir.

Q. I am speaking about vessels that were plying up and down? A. We were inside.

Q. You were inside of their track? A. Yes, sir.

Q. And they passed out to the seaward side of where you were at anchor? A. Yes, sir.

Q. This one vessel that passed inside heard your whistle and came in there to see what was the matter? A. I presume she did.

Q. There was a thick fog, as I understand it?

A. Yes, sir.

(Testimony of Richard Dickson.)

Q. Was there any wind? A. No, sir.

Q. Was there any swell?

A. Very light swell from the westward.

Q. Is it not a fact, Captain, there is always a slight swell on the Pacific Coast?

A. I never passed there yet that I have not seen some swell.

Q. Is that point any different from the other points as to the swell?

A. I never found it any different.

Q. There is always a swell on the Pacific Coast?

A. Yes, sir.

Q. At the time you discovered the tail shaft was broken was [53—21] there any excitement on board? A. No, sir.

Q. You had passengers on board and some cargo, I understand? A. Yes, sir.

Q. Was the crew excited at all? A. No, sir.

Q. Perfectly calm? A. Everything calm.

Q. What was the first thing you did after you discovered the tail shaft was broken?

A. To find out what ships were around.

Q. How did you ascertain that?

A. By wireless; I tried to find out by wireless what ships would be around there.

Q. The "Roanoke" is fitted with wireless apparatus?

Mr. WALL.—This is not proper cross-examination. I would like to have it understood that the witness is their own and we would like to cross-examine him on any of these things.

(Testimony of Richard Dickson.)

Mr. SOOY.—I do not want to encroach upon the rights of counsel. I think counsel has gone into this thoroughly.

Mr. WALL.—There is nothing about his effort to secure aid from any other source.

Mr. SOOY.—I think you went into the matter of wireless messages and so on.

Mr. WALL.—I asked him if he had a wireless and if the wireless was working off Port Harford.

The COURT.—This is not cross-examination of anything brought out by counsel.

Mr. SOOY.—Q. Was the “Roanoke” at any time after she weighed her starboard anchor in any danger as long as the weather remained as it was when you dropped your anchor?

A. From the time we dropped our anchor?

Q. Yes.

A. During the time we lay there? [54—22]

Q. Yes, was she in any danger?

A. None; her anchor chain was hanging perpendicular up and down the ship all the time we lay there.

Q. And you had her starboard anchor over the side?

A. Her starboard anchor and 60 fathoms of chain; that is 320 feet.

Q. Did you have any other anchor on board?

A. I had the port anchor, about 500 pounds already to drop in case I see any sign of wind before it came in, or in case I should want to use it I had it already to drop it.

(Testimony of Richard Dickson.)

Q. You did not drop it, as a matter of fact?

A. I had no occasion to do so.

Q. As long as the anchor, the starboard anchor held the vessel was in no danger? A. No, sir.

Q. If the starboard anchor had not held, not been sufficient to hold that vessel you still had your port anchor? A. Yes, sir.

Q. It was a heavier anchor? A. Yes, sir.

Q. And it would hold more than the starboard anchor?

A. I had 90 fathoms on the anchor, on both anchors I could have given her more chain on the 60 fathoms.

Q. As I understand it, you were towed by the "Santa Clara"—I believe you went into Port Harford, you were towed in there, to Port Harford. I want to confine myself, your Honor, strictly to the cross-examination. A. Yes, sir.

Q. How did you get from your position at that anchorage to Port Harford with the "Roanoke"?

A. By the assistance of the steamer "Santa Clara." [55—23]

Q. By the assistance of the steamer "Santa Clara"? A. Yes, sir.

Q. Did you take any of the passengers off of the "Roanoke" on to the "Santa Clara" when she came there?

A. No, sir, I kept them on the "Roanoke."

Q. How far is it from your position at that anchorage to Port Harford?

A. To the best of my recollection it is about 32 miles.

(Testimony of Richard Dickson.)

Q. The "Santa Clara" reached you what time of day?

A. Five o'clock in the afternoon of the 10th of April.

Q. Did the "Santa Clara" have any lines aboard to tow you with?

A. She did not use them. She said she did not use any. We got our own tow lines ready to use them.

Q. How were those towing lines put aboard the "Santa Clara?" Just tell his Honor how that was accomplished.

Mr. WALL.—That was gone into fully on the captain's testimony when it was taken. It is not cross-examination, and it was gone into in detail.

Mr. SOOY.—I think at this time it might be proper for the purpose of getting the matter before his Honor here.

The COURT.—I will have to read those depositions anyway.

Mr. SOOY.—I think it is proper that we go into it at this time.

The COURT.—It would be satisfactory to me if we had the time.

Mr. WALL.—That was all gone into with the greatest detail.

Mr. SOOY.—We have not cross-examined the testimony of the captain as to that point.

Mr. WALL.—You had an opportunity to do so.
[56—24]

Mr. SOOY.—We have our own methods, your

(Testimony of Richard Dickson.)

Honor, of putting in our case, and we attempt to follow the rules of evidence.

Mr. WALL.—I object to it as not proper cross-examination.

The COURT.—The objection is sustained.

Mr. SOOY.—Q. You were anchored off of Port Harford after the “Santa Clara” let go of the towing line of the “Roanoke,” were you not?

A. Yes, sir.

Q. And you have testified that you were how far from Port Harford?

A. I would say in the neighborhood of about a mile south southeast of the breakwater, or a mile and a half from the wharf.

Q. And were you outside the breakwater at Port Harford? A. We were to the southward.

Q. And outside? A. To the south and east of it.

Q. What is the character of the shore immediately south of Port Harford?

A. South of Port Harford is kind of sandy and rock but to the eastward of Port Harford is more rock; I should say about one mile and a half to the east of the anchorage is as rocky as Point Arguello, and in fact worse because the rocks and reefs are sticking away outside.

Q. Were you in any better position in so far as the safety of your vessel was concerned after the “Santa Clara” left you than you were before she picked you up?

A. We had the Pacific Ocean on us on both places.

(Testimony of Richard Dickson.)

The COURT.—That is hardly an answer to that question.

Mr. SOOY.—Q. Read the question, Mr. Reporter.

(The Reporter reads the question.)

A. We were right in the open roadstead in both places. We [57—25] were anchored in a sandy bottom in both places.

Q. Do you mean by that you were not in any better position?

A. I did not consider it any better position than the other place, in the absence of assistance.

Q. What was the condition of the weather from the time the “Santa Clara” had a line taken aboard her from the “Roanoke” until the tug “Sea Rover” picked you up at Port Harford?

A. From the time the “Santa Clara” gave us the tow?

Q. What was the condition of the weather after you were picked up and towed by the “Santa Clara” until the “Sea Rover” picked you up—what was the condition of the weather?

A. Very thick fog, light wester swell and very light northwest wind and mostly calm up to the time we came to Port San Luis, and after about 9 o’clock in the forenoon a breeze came up from the northwest considerably stronger and then the “Sea Rover” took us in tow.

Q. In other words, there was a much stiffer breeze at the time the “Santa Clara” let go of you than there was at Point Arguello?

A. We had a moderate breeze.

(Testimony of Richard Dickson.)

Q. Was it a stiffer breeze than the one you had at Point Arguello? A. There was none at all.

Q. No wind at all at Point Arguello?

A. No, sir.

Q. You said the "Roanoke" was not in any particular danger at Point Arguello as long as her anchor chain held. Do you know what the prevailing winds are off Point Arguello along that section of the coast during the month of April?

A. We expect along that part of the coast to have the prevailing winds from the northwest at that time of the [58—26] year.

Q. If the winds are northwest and the vessel is bound north from Los Angeles, what would be the tendency of the wind if the vessel was on her course?

A. To put her further offshore.

Q. In other words, the prevailing winds along that section of the coast below Point Arguello have a tendency to blow the vessel offshore?

A. Further offshore.

Q. And in your opinion, then, that accounts for the fact there was no strain on the anchor chain of the "Roanoke" while off Point Arguello?

Mr. WALL.—Objected to as not proper cross-examination, the captain said there was no wind.

The COURT.—He said that in answer to your question.

Mr. WALL.—What do you want him to say?

The COURT.—Do you want to contradict the captain, and make him wish there was no calm there?

(Testimony of Richard Dickson.)

Mr. SOOY.—I do not want to contradict the witness at all.

The COURT.—He has already said it was calm.

Mr. SOOY.—Q. Was the glass at any time of the barometer falling after the anchorage?

A. The barometer was at a standstill; to the best of my recollection it read 29.88; I am not positive of that.

Q. Was there any indication of a storm brewing at all? A. No, sir, there was not.

Q. Were there any indications of a storm brewing at any time from the time you were picked up by the “Santa Clara” until the “Santa Clara” dropped you off Port Harford? [59—27]

A. There was not except that thick fog.

Q. What were the indications as to the weather, Captain?

A. The indication was good; good weather, that is, as well as I could see it according to the glass.

Redirect Examination.

Mr. WALL.—Q. Captain, counsel in one of his questions asked you if you permitted her to drift after the tail shaft was broken. You did not permit her to drift, did you?

A. She drifted into 15 fathoms.

Q. You could not keep her from drifting, could you?

A. I could not keep her from drifting; I wanted to get in as close as I could to get a better anchorage.

Q. You could not keep her from drifting?

A. I could not keep her from drifting.

(Testimony of Richard Dickson.)

Q. After the "Sea Rover" took you in tow where did the "Sea Rover" take you to?

A. San Francisco.

Q. When you were anchored at Port Harford you were 52 miles nearer San Francisco than when you were anchored at Point Arguello, were you not?

A. That is it.

Q. How long did it take you to come from Point Arguello to Port Harford?

A. We started from Point Arguello about half past five that evening of the 10th and we got in Port Harford, we dropped the anchor somewhere around between five and six in the morning, but we were cruising around Port Harford waiting for daylight on account of the fog.

Q. Then the "Santa Clara" got off Port Harford in the neighborhood of 4 o'clock that morning and cruised backwards and forwards until then?

A. Yes, sir.

Q. How was it when the "Sea Rover" came?

A. It was clear [60—28] when the "Sea Rover" came to us.

Q. You knew the "Sea Rover" was coming?

A. We knew that the "Sea Rover" was coming.

Q. How did you know?

A. By telegraph from San Francisco.

Q. From whom? A. From the office.

Q. From the office of the North Pacific Steamship Company? A. Yes, sir.

Q. From President Doe of the company?

A. Yes, sir, from the office somewhere.

(Testimony of Richard Dickson.)

Q. Did you have any passengers for Port Harford? A. We had not.

Recross-examination.

Mr. SOOY.—Q. Did you take any passengers off of the “Roanoke” and put them aboard the “Santa Clara” before you were picked up by the tug?

Mr. WALL.—He answered that once.

The COURT.—No.

Mr. SOOY.—Q. Did the passengers remain on board the “Roanoke” until she arrived in San Francisco, Captain? A. Every one.

Q. You say you could not prevent the “Roanoke” drifting inshore when you found the tail shaft was broken. Did you make any attempt to stop her drifting?

A. I did not. I wanted her to drift.

Q. When you discovered the tail shaft was broken if you had put out both of your anchors you could have held her? A. Yes, sir.

Q. The reason why you let her drift was to get her out of the pathway of vessels passing up and down and also to get her [61—29] in a little shallower water?

A. I considered that 17 or 18 fathoms was too much; I wanted to get into shallower water and I could without any danger.

Mr. WALL.—Q. Where did the “Sea Rover” leave you when she brought you to San Francisco?

A. Pier 13.

Q. In a position of safety?

A. She left us fast to the wharf.

[Testimony of G. M. Jessen, for Libelants.]

G. M. JESSEN, called for the libelants, sworn.

Mr. WALL.—Q. You were captain of the “Santa Clara” at the time she picked up the “Roanoke” on the 10th of April of this year? A. Yes, sir.

Q. You were subpoenaed to bring with you the shipping articles, the written contract between the crew of the “Santa Clara” and that vessel?

A. Yes, sir.

Q. The crew do not sign any shipping articles?

A. No, sir.

Q. The crew do not sign any written contract?

A. No, sir.

Q. How do you get your crew?

A. Pick them up out of the saloons, anywhere we can get them.

Q. You pick them out of the saloons and get them anywhere? A. Yes, sir.

Q. You take them aboard and do not make any contract with them?

A. No, sir; they are supposed to be sailors when they come to us.

Q. You do not know of your own personal knowledge of the persons who were aboard your ship on this voyage as a crew, is that correct?

A. The names of them?

Q. Yes, and who they were?

A. I knew nothing. **[62—30]**

Q. Did you have any conversation with any of them as to the terms or conditions under which they shipped?

(Testimony of G. M. Jessen.)

A. I did not; I never saw them at all. The purser attends to that; he has the pay-rolls; that is all I know about it.

Q. Have you got that subpoena with you, Captain? A. I have.

Q. Have you got the official log-book with you?

A. Yes, sir, it is right there.

Q. You say you do not have anything to do with the pay-roll? A. No, sir.

Q. That is what is called the ship's log of the "Santa Clara," is it not? A. Yes, sir.

Q. On this particular voyage? A. Yes, sir.

Q. Will you turn to the log-book under date of April 10th? A. Yes, sir.

Q. I will ask you to read into the record two of the entries of the log-book of the "Santa Clara" of that date.

Mr. SOOY.—We will object to the reading of the log-book unless it is offered, and before it is offered we want to make an objection to it.

Mr. WALL.—I will offer these entries; that is all I am concerned with.

The COURT.—What is your objection?

Mr. SOOY.—We object to it as being incompetent, irrelevant and immaterial.

The COURT.—There is nothing in that that you cannot develop from the testimony of the captain himself. The fact that he had made an entry of it might serve to freshen his memory.

Mr. WALL.—Q. Captain, I show you Libelants' Exhibit No. [63—31] 5, which purports to be a

(Testimony of G. M. Jessen.)

wireless message from the master of the "Roanoke" to you, and ask you if you received such a message?

A. Yes, sir.

Q. I show you Libelants' Exhibit No. 8, which purports to be a wireless message from Dickson, master of the "Roanoke," to you, and ask you if you received that message? A. Yes, sir.

Q. I show you Libelants' Exhibit No. 9, which also purports to be a wireless message to you from Dickson, and ask you if you got that message?

A. I did.

Q. I show you Libelants' Exhibit No. 10, which purports to be a wireless message from Dickson to you, and ask you if you got that message?

A. Yes, sir.

Q. I show you Libelants' Exhibit No. 11, and—

a. Mr. SOOY.—(Intg.) I think you have shown the witness duplicate messages here.

Mr. WALL.—If there are duplicates they will not do any harm.

Q. I show you what purports to be Libelants' Exhibit No. 11, to Dickson of the "Roanoke" from you, and ask you if you sent that message. A. Yes, sir.

Q. I show you Libelants' Exhibit No. 12, which purports to be a message from you to the master of the "Roanoke" and ask you if you sent that message? A. Yes, sir, I sent that.

Q. I show you what purports to be Libelants' Exhibit No. 13, which purports to be a message from Dickson to you, and ask you if you received that message? A. Yes, sir.

(Testimony of G. M. Jessen.)

Q. I show you Libelants' Exhibit No. 14, which purports to be to Dickson from you, and ask you if you sent that message. [64—32]

A. I do not remember if I sent that.

Q. I show you Libelants' Exhibit No. 15, which purports to be a message from Doe to you and ask you if you received that message? A. Yes, sir.

The COURT.—Who is Doe?

Mr. SOOY.—He is the President of the company and the owner of the two vessels, your Honor.

The COURT.—Is there any question about the sending and receiving of these telegrams?

Mr. SOOY.—I think not. We have any objection in there that we wanted to save. My recollection is that it is merely a formal objection.

The COURT.—I mean as to the authenticity of these.

Mr. SOOY.—We want to put in some others and I think there is no question about the sending and receiving of them.

The COURT.—It is only a matter of time, if the authenticity of these messages is conceded.

Mr. WALL.—I will not take up the time of the witness any further.

The COURT.—Proceed. Those that have been offered as exhibits I do not want to take up the time with them. I did not know if you had any others to offer.

Mr. LEVY.—There is no objection to putting in the entire correspondence between all the parties, if the authenticity of the messages can be estab-

(Testimony of G. M. Jessen.)

lished. Here are some others. I think you have seen them, Mr. Wall; you rejected them at the taking of the testimony because **you did not want them.**

Mr. WALL.—No, I have not seen them. I have no objection [65—33] to your introducing those.

Cross-examination.

Mr. SOOY.—Q. Captain Jessen, here are some Marconi wireless telegrams or wireless messages; can you identify those as having been received by you or sending them?

Mr. WALL.—Are those the ones I just looked at?

Mr. SOOY.—Yes.

A. Yes, sir.

Mr. SOOY.—I will offer these telegrams in evidence and ask they be marked Claimant's Exhibit "A."

(The telegrams are marked Claimant's Exhibit "A" and are as follows:)

[Claimant's Exhibit "A"—Telegrams.]

"MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA.

No. 3. From Santa Clara Station.

April 10, 1913.

Dickson, Roanoke.

We are full of freight and passengers. Is it absolutely necessary for me to go to your assistance.

JESSEN."

“MARCONI WIRELESS TELEGRAPH COM-
PANY OF AMERICA.

PACIFIC COAST DIVISION.

No. 4. From Santa Clara Station.

April 10, 1913.

Dickson, Roanoke.

Have orders to tow you to Port San Luis. Have
you any tow lines on board?

JESSEN.”

“MARCONI WIRELESS TELEGRAPH COM-
PANY OF AMERICA.

PACIFIC COAST DIVISION. [66—34]

No. 1. From San Francisco.

April 10, 1913.

Dickson, Roanoke.

Are you totally disabled or can you proceed
slowly? Get Jessen by wireless he will assist un-
til tug reaches you if one is necessary. Give me
full information quick.

DOE.”

“THE WESTERN UNION TELEGRAPH
COMPANY.

San Luis Obispo, Calif., April 10th, 1913.

Doe, Pier 13, San Francisco, Cal.

Do you want us to go to the assistance of Roanoke
takes five hours.

JESSEN.”

(Testimony of G. M. Jessen.)

“MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA.

PACIFIC COAST DIVISION.

Jessen, Santa Clara.

Roanoke two miles south Arguella 10 A. M.
Broken shaft help him if necessary till tug arrives.

DOE.”

Mr. SOOY.—Q. Captain Jessen, you were on April 10th the captain of the “Santa Clara” and received various wireless messages? A. Yes, sir.

Q. And sent some, did you not? A. Yes, sir.

Q. From whom did you receive the first message with reference to the “Roanoke” on that day?

A. From Captain Dickson.

Q. The captain of the “Roanoke”?

A. Yes, sir.

Q. And after you received that message notifying you of the [67—35] breaking of the tail shaft what message then did you send?

A. I have them here. This is the way it happened, the whole thing; I have them here in my pocket. That is just the way they came and the way they were sent. (Handing.)

Q. The first message you got, “Come to our assistance lost wheel two miles south Point Arguello”?

A. Yes, sir, then I got this (pointing).

Q. Then you replied to that “Your message received coming to your assistance”? A. Yes, sir.

Q. Before you sent a reply to that did you send any message to Mr. Doe or to the North Pacific Steamship Company? A. No, sir.

(Testimony of G. M. Jessen.)

Q. In other words, did you decide to go to the assistance of the "Roanoke" before you had permission from the owner?

A. I did,—I was going there. I did not know whether he had a telegram from Mr. Doe; I supposed they had, so I said I will come to your assistance because I did not know whether it was absolutely necessary or not, but I had already telegraphed to him that I started, which I did.

Q. Didn't you wire to Mr. Doe, the owner of these two vessels?

A. I did, if you keep on you will get right to it.

Q. Then after sending this message that you were coming to the assistance of Captain Dickson you received an answer from Dickson "when do you expect to arrive here"? A. Yes, sir.

Q. And you replied, "Expect to arrive in five hours off Point Buchon"? A. Yes, sir.

Q. When did you send the next message?

A. This one.

Q. This is to Charles P. Doe, "Do you want us to go to the [68—36] assistance of Roanoke, takes five hours?" A. Yes, sir.

Q. Then did you receive any reply from Mr. Doe?

A. This one.

Q. "Roanoke" two miles south Arguello ten A. M. reports broken shaft; help him if necessary till tug arrives"? A. Yes, sir.

Q. That would be on the 10th? A. Yes, sir.

Q. Then here is another telegram that you sent to Dickson of the "Roanoke": "We are full of freight

(Testimony of G. M. Jessen.)

and passengers is it absolutely necessary for us to go to your assistance"? A. Yes, sir.

Q. You sent that? A. Yes, sir.

Q. That was sent at 12:05 A. M. That was an hour after you notified Captain Dickson that you were coming? A. Yes, sir.

Q. Now, the next one. "We need your assistance at once, Dickson"? A. Yes, sir.

Q. That was 12:07 in reply to yours?

A. Yes, sir. That is, I got orders to keep on going south.

Q. This is a telegram from you to Sullivan?

A. That is the agent at Port San Luis. "Unless I get orders will keep on going south."

Q. What did you mean by that?

A. I did not think he was in a bad place, I knew the place; so I was going to go right on to him until the tug came.

Q. Unless you got orders from whom?

A. Yes, sir.

Q. Who? A. Mr. Doe.

Q. That is, if Mr. Doe had not ordered you to go to the "Roanoke" to give her whatever assistance she might require you would not have gone at all?

A. No, sir. [69—37]

Q. Here is a telegram from Mr. Doe to Captain Jessen, "Bring Roanoke to port San Luis tug leaving San Francisco to tow her in"? A. Yes, sir.

Q. What time did you expect to arrive at the "Roanoke"?

A. I said in the morning—I could not tell.

(Testimony of G. M. Jessen.)

Q. After you sent the wire to Dickson that you would come to him immediately and it would take you five hours you evidently changed your mind, did you, Captain?

Mr. WALL.—Objected to as not proper cross-examination and as leading and trying to put in his own witness' mouth something that is self-serving.

The COURT.—Are these the telegrams you have just been identifying?

Mr. WALL.—Yes.

The COURT.—Were they already in evidence?

Mr. WALL.—No.

Mr. SOOY.—I am cross-examining the witness in reference to the telegrams which Mr. Wall has asked him on direct examination. I have a right to lead the witness on cross-examination. I am asking him whether or not he did not change his mind.

The COURT.—The objection is overruled.

Mr. SOOY.—Q. How do you account for the fact that you sent those two different kinds of telegrams?

A. Which two?

Q. You sent to Captain Dickson "I will be there in five hours?" A. Yes, sir.

Q. And in the other telegram to Sullivan you said you were going on south if he did not need assistance?

A. I had a telegram from Mr. Doe about that saying to go [70—38] and bring him to Port San Luis.

Q. You were waiting then for a telegram from Mr. Doe before you started to the aid of the "Roan-

(Testimony of G. M. Jessen.)

oke''? A. Yes, sir.

Q. Had you not gotten that order you would not have gone to the "Roanoke"? A. I would not.

Mr. WALL.—Q. How far were you from Port San Luis when you got the first message from Captain Dickson? A. About 10 miles.

Q. Did you keep on towards Port San Luis when you got the message?

A. When I got the message I hauled her out one and a half points, approximately, until I got further orders.

Q. That is, you were heading in what direction when you got the message?

A. It would be about south southeast, maybe southeast $\frac{3}{4}$ ths east or $\frac{5}{8}$ ths east.

Q. Then, you hauled her out to seaward about how much after you got the message?

A. I went right straight for Arguello. I do not remember now. I do not remember how many points on the compass.

Q. What I am trying to get at was this. When you got that message you were heading for Port Harford? A. Yes, sir, heading south southeast.

Q. After you got the message you changed your course so as to head for Point Arguello?

A. Yes, sir.

Q. Immediately after getting the message?

A. Yes, sir.

Q. And continued on that course until you made the "Roanoke"?

A. As soon as I got off Port San Luis, the differ-

(Testimony of G. M. Jessen.)

ence was so little in 10 miles it did not amount to much. I kept a going until I got the telegram.
[71—39]

Q. When you got the message you were heading for Port Harford, and after you got the message you changed your course so as to head for Point Arguello and kept on that course until you made the "Roanoke"?

A. Yes, sir, that is true; I made no change until I got the message from Mr. Doe.

Mr. SOOY.—Q. Did you, as a matter of fact change your course any?

Mr. WALL.—He just said he did.

A. I was here at Point Buchon this way (illustrating), and then when I got that message I hauled up this way, that is a little bit out.

Q. Don't you keep right on your course if you are going down the coast—don't you keep on your course? As a matter of fact, in going down the coast don't you keep on your course?

Mr. WALL.—He testified he changed his course.

A. From that point to this point, that is south by east $\frac{3}{4}$ ths east.

Mr. SOOY.—Q. Don't you keep right on that course?

A. After I start from here? When I got word from Mr. Doe I went there (pointing).

Q. Instead of turning here into Port San Luis you kept right on going? A. Yes, sir.

Q. In other words, you would have to go out of your course to go to Port San Luis? A. Yes, sir.

(Testimony of G. M. Jessen.)

Q. Instead of turning you kept right on?

A. Yes, sir.

Q. That is as I understand it? A. Yes, sir.

Q. That is right in the track of vessels going from San Francisco to San Pedro?

A. Yes, sir. That time of the year it is not smooth. [72—40]

Mr. WALL.—Q. When you got the message, Captain, you were heading on some course, weren't you?

A. Yes, sir.

Q. After you got the message you changed your course somewhat to the right, to seaward?

A. Yes, sir.

Q. And you continued on that course, the new course until you made the "Roanoke"?

A. Yes, sir.

Mr. WALL.—That is all.

Further Cross-examination.

Mr. SOOY.—Q. Tell me where you were on this map when you changed your course. A. Where?

Q. Yes.

A. At Point Buchon; I kept going until about off about like there (pointing). I do not exactly know where I hauled her out.

The COURT.—Q. Where were you heading for when you received the message?

A. In there. I was going in here, in Port Harford (pointing).

Mr. SOOY.—Q. Instead of going into Port Harford what did you do?

(Testimony of G. M. Jessen.)

A. I kept for this point because Dickson was laying there with the "Roanoke."

Q. That is where the "Roanoke" lay?

A. Yes, sir.

Q. How far were you from Point Buchon when you received the first message?

A. I was just making the point, making the point there about a mile. I may have been past it a little, I do not know.

Q. Now, then, Captain, if you are one mile out from Point Buchon if you were going to Port San Luis are you on the regular course to Point Arguello? Let me make it a little plainer.

The COURT.—You are evidently not heading to Point Arguello.

A. I am heading up this way. [73—41]

Mr. SOOY.—Q. I understand. I am asking you—

Mr. WALL.—I want to put in an objection so ask your question fully.

Mr. SOOY.—Q. Captain, if you are bound from Point Buchon to Port San Luis and you are one mile from Point Buchon on your regular run would not Port San Luis be on the regular track to Point Arguello when you are a mile north of Buchon?

Mr. WALL.—Objected to as not proper cross-examination. The captain has gone fully into this matter and has answered that question a number of times.

Mr. SOOY.—Q. If you are bound on your regular run from Point Buchon to Port San Luis and you

(Testimony of G. M. Jessen.)

are one mile from Point Buchon are you then on the regular course to Point Arguello. That is, if you are right here and are bound for Port San Luis would you not be on the regular course to Point Arguello? A. Yes, sir. Instead of going here—

Mr. WALL.—Finish your answer.

Mr. SOOY.—I have asked the witness just to answer the question.

The COURT.—He has answered it.

Mr. WALL.—Q. Instead of going here what else were you going to say?

The COURT.—The whole matter is taking up time. The witness has said that whatever course he was on he changed it to go to Point Arguello. You are trying to say it was not necessary; it does not mean any more, does it?

Mr. SOOY.—I think your Honor does not do me justice. I am not attempting to confuse this witness.
[74—42]

The COURT.—I do not say that.

Mr. SOOY.—The point is, as a matter of fact, he was on this course, right on that course and he was heading for Point Arguello without making any change at all; if he had kept on the course he was on when a mile from Buchon he would have hit Point Arguello, but he had to change his course to get in here.

The COURT.—That is not what he said.

Mr. SOOY.—I know. What I am talking about is the way counsel put his questions has confused the witness.

(Testimony of G. M. Jessen.)

Q. If you were a mile from Point Buchon—

The COURT.—It is not a question of what he used to do, it is a question of what he did.

Mr. SOOY.—He had to keep off the track.

The COURT.—The question was asked the witness this way: He was asked when you received that message you were heading on some course and he said I was. He was asked, you changed that course to go to Point Arguello and he answered he did. He was then asked, you did not change that course again until you made Point Arguello and he said no; that is what occurred.

Mr. SOOY.—The fact is he did not change his course.

The COURT.—If that be true the captain has not told the truth.

Mr. SOOY.—The captain does not understand the question.

The COURT.—I think the captain is intelligent enough to know.

Mr. SOOY.—Q. Which way is north, Captain?

A. This way (pointing). [75—43]

Q. Where is Point Buchon?

A. Here (pointing).

Q. That is Point Arguello (pointing)?

A. Buchon is here. That is Arguello (pointing).

Q. You were bound from Point Buchon to San Luis? A. Yes, sir.

Q. When you get a mile south of Point Buchon what course are you on. Right there, is that a mile where I marked that with a pencil?

(Testimony of G. M. Jessen.)

A. Yes, sir, approximately.

Q. When you are there where are you steering for?

A. Not knowing anything about the "Roanoke"?

A. Yes. A. Southeast.

Q. Right along that way? A. Yes, sir.

Q. Then you do not steer for Point Arguello?

A. No, sir, right along here, southeast.

Mr. SOOY.—I see; I will take it all back. That is all.

Further Redirect Examination.

Mr. WALL.—Q. You say you had fog when you were off Point Buchon? A. Yes, sir.

Q. When you got the message, the first message?

A. It cleared off about that time. It was in patches; it came in thick and it cleared off at Port San Luis about 10 miles and then shut down thick again.

Q. And from the run from Buchon down to Point Arguello how was the weather as to fog?

A. The first half smooth and fine weather and then it shut down foggy, thick fog.

Q. Do I understand the last half of the trip was thick fog? A. Yes, sir.

Further Cross-examination.

Mr. SOOY.—Q. What time?

A. I think it was 4:45 or [76—44] 5:45, I am not positive.

Q. On the morning of the 10th or 11th?

A. The 10th, not the morning; it was not in the

(Testimony of G. M. Jessen.)

morning, it was in the evening when I got there.

Mr. SOOY.—That is all.

Mr. WALL.—That is the libelants' case.

[**Testimony of Richard Dickson, for Claimant.**]

RICHARD DICKSON, called for the claimant.

Mr. SOOY.—Q. Will you describe to his Honor just how the hawser was placed aboard the "Santa Clara" from the "Roanoke"? A. Yes, sir.

Mr. WALL.—I will be willing to agree to stipulate as to it.

Mr. SOOY.—I prefer to have the captain tell it, so it will be plainly understood.

A. When the "Santa Clara" arrived close to us, I would say about a mile, in that neighborhood—we seen her, we were hearing her whistle all the time, when she came close enough to us we put a boat over with our own crew, the first officer and three sailors, to the best of my recollection; or four sailors, with our own line there and they took it to the "Santa Clara." The "Santa Clara's" crew was receiving it aboard their ship and taking it aboard to make it fast. The work was done by the "Roanoke's" crew; the line belonged to the "Roanoke"; everything belonged to us. On arrival in Port San Luis it was also let go by the crew, dumped overboard and we hove it in on the "Roanoke." [77—45]

Q. In other words, the "Roanoke's" lines and the "Roanoke's" men and the "Roanoke's" crew—

The COURT.—Are you doing this for the benefit of the Court?

(Testimony of Richard Dickson.)

Mr. SOOY.—No.

Q. What did the crew of the “Santa Clara” have to do with the passing over of the lines to the “Santa Clara”?

A. Nothing except letting go and making them fast.

Q. Except making the lines fast on the “Santa Clara”?

A. Yes, sir.

The COURT.—That is just exactly what he said before.

Mr. SOOY.—I think not.

The COURT.—Not at all. He said when the “Santa Clara” came up the “Roanoke” put a boat over and brought the line to them and the only thing they did was to make it fast and let go of it at Port Harford.

Mr. WALL.—And that is what he said in his testimony taken before the Commissioner.

Mr. SOOY.—Q. You have testified there was no excitement among the women and children on board. Was there any excitement on board the vessel after she was dropped by the “Santa Clara” off Port San Luis or Port Harford?

A. No, sir.

Q. There was not?

A. No, sir.

Q. What was the position of the “Roanoke” with relation to the Pacific Ocean?

The COURT.—What time?

Mr. SOOY.—Q. When she was anchored?

A. We were heading about northwest; there was a light northwest wind and a little [78—46] cur-

(Testimony of Richard Dickson.)

rent from the northwest which kept us heading to the northwest.

Q. And stern, of course, would be to the southeast?

A. In a northwest direction; I do not say it was exactly, but in a northwest direction.

Q. And held by her starboard anchor which is on the forward end of her? A. Yes, sir.

Q. Are you familiar with the bed of the ocean, the holding ground three miles south of Point Arguello?

A. I had experience at that time I was anchored there with the "Roanoke."

Q. You are familiar with other anchorages in the Pacific Ocean? A. I had some experience.

Q. And you know where the bed of the ocean is considered good holding ground for anchorage and where it is not?

A. I think I do; I have had quite a little outside experience.

Q. What would you say as to the qualities of the ocean bed there for holding an anchor, what would you say they are?

A. I would consider a sand, clay and mud mixture of that composition is the best holding ground.

The COURT.—That is off Point Arguello?

Mr. SOOY.—And below Point Arguello.

The COURT.—Where the vessel was located.

Mr. SOOY.—Yes.

Q. What would you say *are* the relative merits of the ocean bed were where the "Roanoke" was anchored before she was picked up by the "Santa Clara," and after she was dropped at Port Harford,

(Testimony of Richard Dickson.)

which is the best? A. About the same.

Q. There is no difference between the two?

A. No, sir. [79—47]

Q. Did your crew of the “Roanoke” sleep regular turns after the “Roanoke” was picked up by the “Santa Clara”?

A. The watches were going on just the same.

Q. And before the “Roanoke” was picked up while she was lying at anchor did your crew sleep their regular turns, too?

A. The watch was standing just the same as when running under ordinary conditions.

Q. And did the passengers rest and sleep as they did before?

A. Just the same; they were looking around; it did not make any difference to them as when we were coming up the night before.

Q. Was there any change in the regular daily routine or nightly routine on the “Roanoke” while lying there or after the “Roanoke” was picked up by the “Santa Clara”?

A. None whatever; we were just waiting for the “Santa Clara” to come.

Q. No excitement on board. I think I asked you that question before? A. No, sir.

Q. Was there any possibility of collision with vessels that were passing up and down the coast when you were at anchor at Point Arguello?

A. We were blowing our signal of two blasts every one minute, which would have avoided any collision with any vessel that might come along.

(Testimony of Richard Dickson.)

Q. So there was no danger of collision with any ship passing up and down?

A. None whatever. They could hear our whistle two or three miles; it was calm.

Q. How far was the "Santa Clara" from you when she heard your whistle, if you know?

A. I received a message from the "Santa Clara," saying she [80—48] could hear our whistle, I presume in the neighborhood of about 25 minutes or one-half an hour before she arrived at our side.

Q. How far could the "Santa Clara" be away?

A. Four or five miles.

The COURT.—Do you contend that this vessel was in such condition that she was in danger of collision? I am asking counsel if it is seriously urged.

Mr. WALL.—There was an element of danger.

The COURT.—Q. She would be how far away from you if she took over 25 minutes to reach you. Four or five or six miles?

A. I presume in that neighborhood, about four or five miles. Of course, I heard her whistle a long time before she came to us.

Mr. SOOY.—Q. When the "Santa Clara" came up and saw you, how far away did she remain from the "Roanoke" while you were putting this line aboard her?

A. We had a line 125 fathoms long of 12-inch manila hawser, which was hauled on board. I would judge she was in the neighborhood of about 400 or 500 feet away from us; about 400.

Q. Was there any danger of collision after the

(Testimony of Richard Dickson.)

“Santa Clara” sighted the “Roanoke”?

A. I did not see any danger whatsoever of any collision.

Q. With the weather condition and the sea just as they were at that time you would say there was or was not any danger of collision?

A. The “Santa Clara” was handled in proper manner and there was no danger of collision whatsoever.

Cross-examination.

Mr. WALL.—Q. Did you take any specimens of the bottom [81—49] while you were anchored off Point Arguello?

A. Only what I saw on the anchor when it came up.

Q. You are familiar with the Government chart, are you not? A. I have had experience.

Q. Can you indicate anything on the Government chart in the vicinity where you anchored that indicates anything except sand in the bottom?

A. No, sir, I cannot.

Redirect Examination.

Mr. SOOY.—Q. What came up on the anchor?

A. There was a mixture of mud and sand and a little clay came up; the clay was on the chain, sticking on the chain; so that shows there was quite a little mixture.

Q. How much of the chain was covered with that sand and mud you described came up?

A. Fifteen fathoms.

Q. Fifteen fathoms?

(Testimony of Richard Dickson.)

A. It was a mixture of sand and mud and a little clay.

Q. From that how far would you say that anchor had gone down into the mud, sand and clay?

A. Not very much, but it shows it had been lying in it.

Q. You could not tell from the amount of mud on the chain how far the anchor went down into the mud? A. No, sir.

Q. From your experience there you would say it was good holding ground? A. Yes, sir.

Recross-examination.

Mr. WALL.—Q. Your experience would be based, then, on the experience you had while anchored there at that place?

A. No, sir, I have anchored a hundred times in what we call the hundred roadstead.

Q. Were you ever anchored at this place except on that particular [82—50] time? A. No, sir.

Q. Your knowledge is based on that particular time, what you noted at that particular place at that time? A. Yes, sir.

Q. And during that time you say you had no wind?

A. No, sir.

Q. Is that correct? A. Yes, sir.

[**Testimony of G. M. Jessen, for Claimant.**]

G. M. JESSEN, called for the claimant.

Mr. SOOY.—Q. Captain, what did your crew do out of the ordinary course of its duty after you picked up the towing hawser from the “Roanoke”

(Testimony of G. M. Jessen.)

until you let your line go?

A. Stood the regular watches.

Q. Stood the watches?

A. The regular watches, the same as always.

Q. How many men stood watches?

A. The general number of the crew.

Q. Did you have any more watches while you were towing the vessel than you do ordinarily?

A. No, sir.

Q. Was there any difference in the regular daily routine of the ship's life of the "Santa Clara" after you picked up the "Roanoke" than there was the day before, for instance?

A. No, sir, nothing; except the men on deck watching the line, seeing it would not chafe. The sailors have to look out for such things as that.

Q. The watchman did that?

A. Of course, the sailors would do that; of course, that is their regular duty to look out for such things as that.

Q. Do I understand you to say that there was not any change [83—51] in the regular duties of the ship's life at all? A. No, sir.

Q. While you were towing the vessel?

A. No, sir.

Q. Your crew slept just the same, did they not?

A. Yes, sir.

Q. Took up their watches just the same?

A. Yes, sir.

Q. Had their meals just the same? A. Yes, sir.

Q. They had no extra labors to perform?

(Testimony of G. M. Jessen.)

A. No, sir.

Q. No extra duties to perform? A. No, sir.

Q. They turned in on the hour and got up on the hour? Yes, sir.

Q. Captain Jessen, did you ever at any time receive a wireless message from the "Roanoke" stating that the steamer "Roanoke" was drifting on shore, or that the wind where said steamer "Roanoke" then was was blowing from the east towards the shore, or that the weather where said steamer "Roanoke" then was was foggy—did you ever receive a message of that kind? A. I did not.

Mr. LEVY.—May I ask the Captain one or two questions?

Mr. WALL.—I think there ought to be one counsel examining the witness, it takes up so much time.

The COURT.—Proceed.

Mr. LEVY.—Q. In regard to the allegation in the libel, Captain, that while steaming towards Point Arguello the steamer "Santa Clara" ran into a thick fog and that said fog continued to prevail until after the steamer "Roanoke" was taken in tow.

Mr. WALL.—He testified about that already.

The WITNESS.—I could not tell you now; two o'clock it [84—52] might be.

Mr. LEVY.—Q. Two o'clock in the afternoon?

A. Yes, sir, about.

Q. And you say you started for the "Roanoke" about 10 in the morning, was it?

A. No, sir, it was 11,—about that.

Q. It was an hour or an hour and a half perhaps

(Testimony of G. M. Jessen.)

after? A. Yes, sir.

Q. In regard to the allegation in the libel that when the "Santa Clara" arrived off Point Arguello the "Roanoke" was found lying at an anchor about half or three quarters of a mile from the shore. How many miles was the "Roanoke" from shore?

A. I do not know, I could not see where he was; he was in 15 fathoms, so far as I know; he had good anchorage.

Q. There was an allegation in the libel that the navigation of the "Santa Clara" was dangerous? Is that a fact, that the navigation was dangerous?

A. Not that I am aware of.

Q. Did you at any time come up at all dangerously near colliding with the "Roanoke" when you came up near to her?

A. I had to go close enough to get a line there.

Q. How many feet was that?

A. How many feet? Oh, it probably may have been 100 feet off. I got to go close enough to get a line aboard. I think it was my lookout to see she did not collide.

Q. Had you heard any signal from the "Roanoke" during the time you approached her?

A. I heard his whistle before I got to them.

Mr. SOOY.—Q. How long did it take to tow the "Roanoke" [85—53] from Point Arguello to Port San Luis?

A. We got there in the morning about 6 o'clock we were going slow.

(Testimony of G. M. Jessen.)

Q. Where did you leave the "Roanoke" in relation to Port San Luis?

A. Off the breakwater. I guess about the south-east end of the breakwater; it was foggy; I do not know exactly where.

Q. Was the "Roanoke" in any more dangerous position at Point Arguello than she would be where you left her off Port San Luis if her anchor held?

A. I do not think so.

Q. You consider one place as dangerous as the other? A. About the same between the two places.

Q. Do you consider that the "Roanoke" was in any danger when she was anchored there below Point Arguello?

A. No, sir, she was in no danger whatsoever.

Q. You have had some long experience at sea, have you not?

A. About 44 years on steamers of all kinds.

Q. You are familiar with the custom on the Pacific Coast as to one vessel rendering assistance to another vessel when both are owned by the same firm, or person, or corporation, are you not?

Mr. SOOY.—I will withdraw that question.

Q. Is there any custom on the Pacific Coast as far as you know, Captain, as to the assistance which one vessel should give another when both vessels are owned by the same owner?

Mr. WALL.—I object to that question; the law gives the rule on the question of salvage.

The COURT.—We will determine that later.

Mr. SOOY.—Q. Is there?

(Testimony of G. M. Jessen.)

A. Not that I know of.

Q. You do not know of such custom?

A. No, sir. [86—54]

Q. Can you distinguish between whether or not this was a case of towage or a case of salvage?

Mr. WALL.—I submit, if the Court please, that is objectionable because it is a question which the Court has to decide; the Court cannot substitute the Captain's judgment for its own. It would not make any difference whether he is an expert or not.

Mr. LEVY.—He testified to the general attitude of seafaring men upon occasions of this kind.

Mr. WALL.—You asked him to testify whether it is one thing or another.

The COURT.—The rule in other matters would be to state what was done.

Mr. SOOY.—I think that is the correct ruling; I quite agree with your Honor.

Mr. LEVY.—I withdraw the question.

Mr. SOOY.—Q. You have not made any claim on account of salvage or towage or either one?

A. I have not.

Q. Why not?

Mr. WALL.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—It is a question whether these men are entitled to it.

Mr. SOOY.—I want to ask the Captain one more question.

Q. Have you ever known in your experience as a seafaring man on this coast of one vessel helping an-

(Testimony of G. M. Jessen.)

other vessel where both vessels are owned by the same owner? A. Yes, sir.

Q. Do you know whether it is customary or not for one of [87—55] such vessels to hold any claim for salvage for helping a sister ship?

Mr. WALL.—The same objection, it is contrary to law. A. I do not.

Cross-examination.

Mr. WALL.—Q. The crew of the “Santa Clara” had to look out for the line of the “Roanoke” while they were towing her? A. Look out for the line?

Q. Yes, while it was made fast on your ship?

A. Look out to see it did not chaff?

Q. And watch to see it did not part?

A. It was a matter of duty.

Q. They had to watch to see it did not part?

A. I looked out for that myself, I was on deck all night.

Q. They had to be on the lookout for it?

A. I done that.

Q. And when you got to Port Harford you were about 30 or 40 miles nearer to San Francisco, were you not? A. 34 miles.

Q. And you knew the tug “Sea Rover” was coming down to take the “Roanoke”?

Mr. SOOY.—Objected to as incompetent, irrelevant and immaterial; he may or may not know.

The COURT.—It seems to be a fact.

Mr. SOOY.—I withdraw the objection.

A. Yes, sir.

(Testimony of G. M. Jessen.)

Redirect Examination.

Mr. SOOY.—Q. The crew on the “Santa Clara” were paid for its time they were towing the vessel, were they not?

Mr. WALL.—Objected to as incompetent, irrelevant and [88—56] immaterial; it does not affect the rights of the libelants in this matter.

The COURT.—The objection is overruled.

A. I guess perhaps they had some overtime getting the line aboard; that might be as anywhere else; it is the same thing whenever you work after 5 o'clock you get paid for it unless it is on watch.

Q. They were paid their regular daily wages for their service and for any overtime if they worked overtime? A. The same as anywhere else.

Q. And they were paid? A. I expect they were.

Q. You say you looked out for the line?

A. I was all night on deck there.

Q. Did you have to change it at any time during the night? A. No, sir.

Q. Do you know whether or not there was ever any objection made by any of the crew as to the amount they received for that voyage?

Mr. WALL.—Objected to as incompetent, irrelevant and immaterial; it cannot possibly affect the libelants.

The COURT.—They are not suing their ship for wages. The objection is sustained.

Mr. SOOY.—That is all.

[Testimony of G. M. Jessen, for Claimant (Recalled).]

G. M. JESSEN, recalled.

Mr. SOOY.—Q. Your run on the “Santa Clara” is between San Pedro and San Francisco?

A. Yes, sir. [89—57]

[Testimony of Richard Dickson, for Claimant (Recalled).]

RICHARD DICKSON, recalled.

Mr. SOOY.—Q. Your run at the time the tail shaft was broken on the “Roanoke” was from San Pedro to San Francisco? A. Yes, sir.

[Testimony of Charles P. Doe, for Claimant.]

CHARLES P. DOE called for the claimant, sworn.

Mr. SOOY.—Q. You are president of the Northern Pacific Steamship Company, a California corporation? A. Yes, sir.

Q. The owner of the S. S. “Roanoke” and the S. S. “Santa Clara”? A. Yes, sir.

Q. Those vessels ply between San Francisco and San Pedro, do they not? A. Yes, sir.

Q. And they are both domestic vessels registered here, are they not? A. Yes, sir.

Q. You have testified in regard to these wireless messages received and sent by you, and they are substantially correct, are they not? A. Yes, sir.

Q. You did receive a message from Captain Jessen of the “Santa Clara” asking for instructions in regard to whether he should go to the assistance of the

(Testimony of Charles P. Doe.)

“Roanoke”? A. I did.

Q. And you ordered him to proceed to the assistance of the “Roanoke”?

A. Yes, sir, to bring her up to Port San Luis.

Q. How long have you been engaged in shipping on the Pacific Coast? A. Over 20 years.

Q. And the North Pacific Steamship Company has some eight vessels that regularly ply in the waters of the Pacific?

A. We did have eight; one short now. [90—58]

Q. Do you know whether or not it is customary among ship owners to have one vessel render assistance to another vessel when both vessels are owned by the same firm?

Mr. WALL.—Objected to as incompetent, irrelevant and immaterial, and having no effect on the libelants in this case.

The COURT.—The objection is overruled.

Mr. SOOY.—Q. Yes, or no? A. Yes, sir.

Q. Will you tell his Honor what that custom is on the Pacific Coast?

Mr. WALL.—The same objection.

The COURT.—That may run to all this testimony; it is either or is not objectionable.

A. It is customary among ship owners that their own vessels shall assist another boat belonging to the same firm. When we have more than one vessel running on the same route we take this into consideration in the question of insurance, and the orders are that one ship shall help the sister ship. Whenever possible we have two vessels running on

(Testimony of Charles P. Doe.)

the same route and we do this for our own protection, and that is one reason why we use more than one vessel on the same run, and also for protection so that in the event one vessel needs the assistance of another she will be in that locality.

Q. What is the rule as to compensation or salvage where one vessel helps another when both vessels are owned by the same corporation?

Mr. WALL.—The same objection. That is a question to be determined by the Court.

A. I think all those cases have been determined by the Court. [91—59]

Mr. SOOY.—Q. I am asking you what the custom is in regard to compensation?

A. When both vessels are owned by the same firm?

Q. When there is no controversy, when both vessels are owned by the same person?

Mr. WALL.—The same objection.

A. Yes, sir.

Mr. SOOY.—Q. That custom that you have testified to when one vessel helps another vessel is there any compensation for the vessel when both vessels are owned by the same firm?

A. Not in ordinary towage.

Q. What can you say in the case of salvage?

A. I think the crew in salvage would have some right for compensation.

Q. In other words, the custom depends on the amount the crew receives?

A. It is a simple proposition; it is a proposition of the amount the crew is paid; sometimes it is paid

(Testimony of Charles P. Doe.)

by the company but more often by the decision of the Court.

Q. You have heard the testimony in regard to the "Roanoke," would you say that came under the custom as a case of salvage or towage?

Mr. WALL.—Objected to as calling for the conclusion of the witness, and as being a matter which the Court will have to determine.

The COURT.—The objection is sustained.

Mr. SOOY.—Q. Were the members of the crew of the "Santa Clara" paid in full for all overtime during the time they were towing the "Roanoke"?

A. Yes, sir.

Q. On April 10th and 11th?

A. They were paid everything [92—60] coming to them.

Q. Was there any objection made by any member of the crew that they were not paid the amount coming to them for what they performed during this service?

Mr. WALL.—Objected to as incompetent, irrelevant and immaterial, and as being a matter that cannot possibly affect any claim made by the libelants in this case of salvage.

The COURT.—The objection is sustained.

Cross-examination.

Mr. WALL.—Q. The "Roanoke" sometimes runs up to Seattle, does she not? A. Never.

Q. Was she run by the California & Atlantic Steamship Company? A. Before we owned her.

(Testimony of Charles P. Doe.)

Q. Is she still the same sort of vessel?

A. Yes, sir.

Q. As to the crew on board the "Santa Clara" during the time the "Roanoke" was brought up did you have anything to do with shipping them?

A. No, sir.

Q. You had nothing to do with their going aboard?

A. Only in regard to the ship's rules and regulations.

Q. You had no statement or condition that they shipped under? A. No, sir.

Q. You never told them about any custom in regard to salvage?

A. I did not, never met them personally.

Mr. SOOY.—Q. Since the North Pacific Steamship Company has owned the "Roanoke" she has not run to Seattle? A. No, sir. [93—61]

[Testimony of Richard Dickson, for Claimant (Recalled).]

RICHARD DICKSON, recalled.

Mr. SOOY.—Q. Do you know what the custom is, Captain, as to one vessel helping another vessel without compensation where both vessels are owned by the same person, or corporation on the Pacific Coast?

A. I do know a certain custom.

Mr. WALL.—I understand that is simply preliminary.

Mr. SOOY.—Now, what is the custom, Captain, where two vessels are owned by one person and one vessel is in distress and the other vessel helps it,

(Testimony of Richard Dickson.)

what is the custom as to claiming any salvage or towage?

A. I have been on ships where one has picked up the other, but I never heard of any compensation, at least I have never received any.

Q. Would you say the custom is not to make any charge or any claim for salvage for one ship against the other when both are owned by the same person?

A. Those that I have been shipping with we never get anything but our salary.

Q. Will you say it is not customary to make a charge?

Mr. WALL.—Objected to as leading.

Mr. SOOY.—Q. What would you say the custom is where one vessel helps another when both vessels are owned by the same company?

A. Since I have been on this coast, since 1881 I have heard of several cases of that kind, but I never heard of compensation except what was given by the company. [94—62]

Saturday, September 20th, 1913.

Mr. SOOY.—Your Honor, it is not quite clear in my mind that the record discloses just what time the “Sea Rover” picked up the “Roanoke” off the Port of San Luis.

The COURT.—I think it was about 11 o’clock. The hour is fixed by somebody.

Mr. WALL.—I understand the Captain of the “Sea Rover” is here and I have no objection to his testifying to that.

Mr. SOOY.—I do not care to reopen the matter or put the witness on the stand, but I have been a bit doubtful about that point and wanted to make sure of it.

The COURT.—The tug came at 11 and took us to San Francisco.

Mr. SOOY.—That is all right.

The COURT.—That is your understanding of it, Mr. Sooy, that is the hour?

Mr. SOOY.—That is my understanding, but I did not know whether the record disclosed it.

The COURT.—Yes, that is the testimony.

[Endorsed]: Filed Nov. 24, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

[95—63]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

OSKAR JOHANSEN et als.,

Libelants,

vs.

The Steamer "ROANOKE," etc.,

Respondent.

Testimony Taken Before Commissioner on Reference.

Tuesday, June 17th, 1913.

TESTIMONY TAKEN ON REFERENCE BEFORE FRANCIS KRULL, U. S. COMMISSIONER.

APPEARANCES.

F. R. WALL, Esq., for the Libelants.

C. H. SOOY, Esq., for the Respondent.

[96—1]

[Testimony of Albert H. Ginman, for Libelants.]

ALBERT H. GINMAN, called for the libelants, sworn.

Mr. WALL—Q. Just give the Reporter your name and occupation.

A. Albert H. Ginman; occupation, manager of the Pacific Coast Division of the Marconi Wireless Telegraph Company of America.

Q. And it was such on the 9th and 10th of April of this year? A. Yes, sir.

Q. Mr. Ginman, you were subpoenaed to bring with you all the messages that were exchanged between the steamer "Santa Clara" and the steamer "Roanoke" and both those vessels and C. P. Doe on the 10th day of April?

A. Yes, sir. (Handing.)

Q. These are all on the 10th are they that you have given me? A. Yes, sir.

Q. And these that you hand me, are they ar-

(Testimony of Albert H. Ginman.)

ranged in the order in which they were received by you?

A. That I could not say positively, but those are the ship's copies.

Q. I will ask you to state briefly, Mr. Ginman, what the method of operation is so far as your office is concerned in regard to receiving copies of messages that are sent by wireless between vessels.

A. Messages are received by wireless at the San Francisco station thence by telephone at the main office in the Merchant's Exchange Building and delivered from there by messenger.

Q. I have here what purports to be a bunch of messages marked in blue ink from the files of the steamship "Roanoke," and I will ask you just to state what those are.

A. These are messages that originated on board of the steamer "Roanoke" addressed to the steamer "Santa Clara" and [97—2] to San Francisco.

Mr. SOOY.—I suggest, Mr. Wall, that you mark those for identification so that we will know which ones he is talking about.

The WITNESS.—There are messages here also from San Francisco and from the steamer "Santa Clara."

Mr. SOOY.—I will object to any further testimony in reference to these messages unless they are identified. The record will not show what messages he is talking about.

Mr. WALL.—I am going to put them all in.

Mr. SOOY.—If you will only identify the mes-

(Testimony of Albert H. Ginman.)

sages that he is talking about now we will know what he is talking about.

Mr. WALL.—I will put them all in.

Mr. SOOY.—There are some of one class and some of another class; I cannot tell what they are. If you will introduce them for identification as you go along then the record will show what he is talking about.

Mr. WALL.—Q. I will ask you to produce the first message that was received at your office from the steamer “Roanoke” on the 10th day of April, 1913.

A. From the “Roanoke”?

Q. Yes. A. Can I separate these?

Q. Yes, separate them and hand them to me in their order? A. Yes, sir (handing).

Q. This is the first one; I see that there is marked in the upper part of the right-hand side of the message “time sent 11:07 A. M.” That means the time sent from where?

A. From the steamer to the San Francisco Wireless station.

Q. And sent to “DN FG,” what does that mean?

A. Those are [98—3] the operator’s signatures.

Q. You say this was the first one that was received at your office from the steamship “Roanoke” on April the 10th? A. Yes, sir.

Mr. WALL.—We will offer that in evidence as Libelant’s Exhibit No. 1.

Mr. SOOY.—Q. Did you receive this message personally? A. No, sir.

(Testimony of Albert H. Ginman.)

Q. Where did you get it?

A. From the office files.

Q. You don't know, as a matter of fact, whether it was received or not, do you? A. No, sir.

Q. Where is the man who received this message, do you know?

A. Can I see the operator's signature?

Q. Yes.

A. I believe that operator is on the steamer "Siberia."

Mr. WALL.—Q. You are in charge here of the Marconi Wireless Telegraph Company of America, are you not, Mr. Ginman? A. Yes, sir.

Q. And as such have authority over all the employees of that company here? A. Yes, sir.

Q. As manager? A. Yes, sir.

(The telegram is marked Libelants' Exhibit No. 1.)

Q. Now, what was the next message that was received from the "Roanoke"?

A. That is addressed to San Francisco, you mean?

Q. No, the next one in the order of their receipt from the "Roanoke"?

A. You are referring to messages to San Francisco and not from other steamers or ports?

Q. The next one received to San Francisco?

A. Yes, sir, this one (handing). [99—4]

Mr. WALL.—We offer this in evidence as Libelants' Exhibit No. 2.

(The telegram is marked Libelants' Exhibit No. 2.)

(Testimony of Albert H. Ginman.)

Q. The next one that was received coming to San Francisco?

A. Do you mean referring to San Francisco Wireless station controlled by the Marconi Wireless Company?

Q. Any message that was received coming to San Francisco that came under your notice?

A. I have two messages here that originated on the "Roanoke" but were not sent to the Marconi Wireless Stations.

Q. To whom were they sent?

A. One was sent to Mare Island.

Q. Let me look at that. A. Yes, sir (handing).

Q. This was the next one in the order of receipt?

A. Yes, sir.

Mr. WALL.—We will offer this in evidence as Libelants' Exhibit No. 3.

(The telegram is marked Libelants' Exhibit No. 3.)

Q. And the next one?

A. This one was received at San Luis Obispo.

Q. This is the next one in the order of time?

A. Yes, sir. It may be that that message was given by wireless to the San Luis Obispo station and from there sent by Western Union, so perhaps it would be in the possession of the Western Union files.

Mr. WALL.—We will offer that in evidence as Libelants' Exhibit No. 4.

Mr. SOOY.—I will object to that exhibit No. 4 as incompetent, irrelevant and immaterial and as not

(Testimony of Albert H. Ginman.)

coming within the issues joined here.

(The telegram is marked Libelants' Exhibit No. 4.) [100—5]

Mr. WALL.—Q. The next one that was sent out by the steamship "Roanoke" to anybody else?

A. To the steamer "Santa Clara."

Mr. SOOY.—Q. You say that was sent to the steamer "Santa Clara"?

Mr. WALL.—We will offer that in evidence as Libelants' Exhibit No. 5.

(The telegram is marked Libelants' Exhibit No. 5.)

Q. Now, give me the messages exchanged between the master of the "Roanoke" and the master of the "Santa Clara," in the order in which they were exchanged?

A. We have messages here from San Francisco to the steamer "Roanoke" that may be replies to those messages.

Q. This was sent in answer to which one?

A. That I cannot say.

Q. This was sent from your office here in San Francisco? A. Yes, sir.

Mr. WALL.—I will offer that in evidence as Libelants' Exhibit No. 6.

(The telegram is marked Libelants' Exhibit No. 6.)

Q. This was sent by your office to the "Roanoke" at what time?

A. It was received on the "Roanoke" at 12:22 P. M.

(Testimony of Albert H. Ginman.)

Mr. SOOY.—Q. That is what it discloses on its face, Mr. Ginman? A. Yes, sir.

Q. You do not know of your own knowledge when it was received there except from this record?

A. No, sir, that was the operator's endorsement at the time it was received.

Mr. WALL.—We will offer that in evidence as Libelants' Exhibit No. 7.

(The telegram is marked Libelants' Exhibit No. 7.) [101—6]

Q. And the next one that had been sent in answer to any of these? A. We have no more.

Q. Then give us now the messages exchanged between the "Roanoke" and the "Santa Clara" in the order in which they were exchanged?

A. 10:45 telegram from the "Santa Clara" to the "Roanoke."

Q. Where is the first one that originated on the "Roanoke"?

A. Here it is (handing). I have one prior to that from the "Roanoke" to the "Santa Clara" at 12:07 A. M.

Q. This is the first one sent by the "Roanoke" to the "Santa Clara"? A. Yes, sir.

Mr. WALL.—We will offer that in evidence as Libelants' Exhibit No. 8.

Mr. SOOY.—Q. You don't know anything about this of your own knowledge, do you, Mr. Ginman?

A. No, sir.

Q. You do not know as a matter of fact whether this was received, or not? A. No, sir.

(Testimony of Albert H. Ginman.)

Q. You are not an agent or general manager or have an official connection with the Marconi Wireless Telegraph Company?

Mr. WALL.—He said he was the manager.

A. Yes, sir, I am the manager.

Mr. SOOY.—Q. You do not know anything about whether this was received, or not?

A. Except that—

Q. (Intg.) Of your own knowledge I mean?

A. No, sir.

Mr. SOOY.—I object to the exhibit as incompetent, irrelevant and immaterial and no foundation laid for its introduction.

(The telegram is marked Libelants' Exhibit No. 8.)

Mr. WALL.—Q. What was the next one exchanged between the vessels after No. 8?

A. This appears to be the next [102—7] from the "Roanoke" to the "Santa Clara." One is the sent copy and the other is the received copy.

Q. Which is the sent copy and which is the received copy?

A. This is the sent copy and this is the received copy (indicating).

Q. That is, No. 5 is the sent copy and No. 9 is the received copy? A. Yes, sir.

Mr. WALL.—We will offer this in evidence as Libelants' Exhibit No. 9.

Mr. SOOY.—Q. As I understand this, Mr. Ginman, No. 5 and No. 9 are duplicates?

A. No, sir. One is the transmitted copy on board

(Testimony of Albert H. Ginman.)

the steamer "Roanoke" and the other is the received copy on board the steamer "Santa Clara."

Q. The date and other details in connection with it are the same? A. Yes, sir.

Q. It is the same message, as I understand you, but No. 5 is the copy that you held in your office at the time the messages are received and then at the time the message is sent there is another copy made?

A. No, sir, these are the files of the two steamers. The yellow form is the transmitted form originating on board the ship that transmits the message; the white is the received copy as written on the steamer where the message is received.

Q. So that No. 5 then is the message that originated aboard the vessel?

A. If that is on a yellow form, yes.

Q. Then No. 9 is the same message received?

A. Yes, sir.

(The telegram is marked Libelants' Exhibit No. 9.)

Mr. WALL.—Q. Then the next one?

A. From the steamer "Roanoke" to the "Santa Clara."

Mr. WALL.—We will offer that in evidence as Libelants' [103—8] Exhibit No. 10.

(The telegram is marked Libelants' Exhibit No. 10.)

Q. And the next one?

A. From the steamer "Santa Clara" to the "Roanoke."

Mr. WALL.—We will offer that in evidence and

(Testimony of Albert H. Ginman.)

ask that it be marked Libelants' Exhibit No. 11.

(The telegram is marked Libelants' Exhibit No. 11.)

Q. And the next one?

A. From the steamer "Santa Clara" to the "Roanoke."

Mr. WALL.—We will offer that in evidence as Libelants' Exhibit No. 12.

(The telegram is marked Libelants' Exhibit No. 12.)

Q. And the next one?

A. From the "Roanoke" to the steamer "Santa Clara."

Mr. WALL.—We will offer that in evidence as Libelants' Exhibit No. 13.

(The telegram is marked Libelants' Exhibit No. 13.)

Q. And the next one?

A. From the steamer "Santa Clara" to the "Roanoke."

Mr. WALL.—We will offer that in evidence as Libelants' Exhibit No. 14.

Mr. SOOY.—Q. Is this No. 14 from Jessen to Dickerson? A. That I don't know.

Q. It is from the captain of the "Santa Clara" to the captain of the "Roanoke"?

A. It is addressed to Dickerson and it is signed Jessen.

Mr. WALL.—We admit that this exhibit, No. 14, is from the master of the "Santa Clara" to the master of the "Roanoke."

(Testimony of Albert H. Ginman.)

(The telegram is marked Libelants' Exhibit No. 14.)

Q. And the next one?

A. This is a message from San Francisco to [104—9] to the steamer "Santa Clara" that was sent via the Mare Island Navy Station.

Mr. WALL.—We will offer this in evidence as Libelants' Exhibit No. 15.

Mr. SOOY.—Q. You have not any knowledge of whether this was received, or not?

A. That is the received copy as written by the operator.

Q. Have you any personal knowledge of whether it was received?

A. You mean whether I was there?

Q. Yes. A. No, sir.

Q. You do not know whether it was received, or not, as a matter of fact, do you?

A. It must have been received—

Q. (Intg.) Just answer the question?

A. No, sir.

Mr. SOOY.—I will object to it as incompetent, irrelevant and immaterial and no foundation laid for its introduction.

Mr. WALL.—You were going to say it must have been received, why?

Mr. SOOY.—We object to the conclusion of the witness.

Mr. WALL.—Q. Go ahead and give the answer subject to his objection?

A. It must have been received otherwise the

(Testimony of Albert H. Ginman.)

operator could not have written it unless it originated in his brain.

(The telegram is marked Libelants' Exhibit No. 15.)

Q. And the next one?

A. A message originating on the steamer "Santa Clara" addressed to Doe, San Francisco and sent via the San Luis Obispo station.

Mr. WALL.—We offer this in evidence as Libelants' Exhibit No. 16.

(The telegram is marked Libelants' Exhibit No. 16.)

Q. And the next one?

A. Message from San Francisco addressed [105—10] to the "Santa Clara" via the San Luis Obispo station.

Mr. WALL.—We will offer that in evidence as Libelants' Exhibit No. 17.

(The telegram is marked Libelants' Exhibit No. 17.)

Q. And the next one?

A. There are messages here from the files of the "Roanoke," but I think they are duplicated there; that is to say, these are transmitted copies and these are received copies.

Q. Could you run over and tell whether there are any in there that are not in here?

A. Yes, sir; there is one (handing).

Q. There are none that you have that the substance is not in there?

(Testimony of Albert H. Ginman.)

A. That is one from the "Roanoke" to the "Santa Clara" and that is the "Santa Clara's" copies of messages identically.

Q. And all those messages there are identical?

A. That I don't know unless I check them over.

Q. If there is anything that has not been introduced and that is not in what has been introduced I would like to have it? A. Yes, sir.

Mr. WALL.—We offer this in evidence as Libelants' Exhibit No. 18, being an answer to Libelants' Exhibit No. 5.

Mr. SOOY.—We will object to that statement of counsel as to that.

(The telegram is marked Libelants' Exhibit No. 18.)

Mr. WALL.—That is all.

Cross-examination.

Mr. SOOY.—Q. The typewriting on all of these messages under the printed matter "time sent" indicates what? A. The time sent from the ship.

Q. Indicates the time it was sent from the ship?

A. Yes, sir. [106—11]

Q. You don't know of your own knowledge whether they were sent at that time, do you?

A. No, sir.

Q. All you know about it is what you see on the face of the telegram or aerogram?

A. Yes, sir, exactly.

Q. You were not on board either one of these vessels at the time these messages were sent, were you?

A. No, sir.

(Testimony of Albert H. Ginman.)

Q. You were not in charge of the instrument that received them? A. No, sir.

Q. Nor any of the messages that you testified to?

A. No, sir.

Mr. SOOY.—I make a general objection to all of them.

Mr. WALL.—Q. How did they come under your observation?

A. I produced them from the official files. It is the first knowledge I had of them being received, or sent.

Q. Who has control of that file?

A. The filing clerk.

Q. Is he subject to your orders? A. Yes, sir.

Q. Everybody in your office is subject to your orders? A. Yes, sir.

Q. And you gave him orders to produce them?

A. Yes, sir.

Mr. SOOY.—We object to his testifying that these are aerograms or telegrams received and sent. We object now to all of these aerograms and telegrams introduced here upon the ground that they are incompetent, irrelevant and immaterial and that there is no foundation laid for the introduction of them by this witness.

Mr. WALL.—Mr. Doe, the President of the North Pacific Steamship Company, is present here and his testimony is to be taken, and Mr. Doe has with him here the originals and copies and has checked over all of these messages.

(Testimony of Charles P. Doe.)

Mr. SOOY.—I object to that statement of counsel as not [107—12] evidence in the case and ask that it be stricken from the record.

[Testimony of Charles P. Doe, for Libelants.]

CHARLES P. DOE, called for the libelants, sworn.

Mr. WALL.—Q. Give the Reporter your name, Mr. Doe. A. Charles P. Doe.

Q. What is your business?

A. President and general manager of the North Pacific Steamship Company.

Q. What relation does the North Pacific Steamship Company bear to the steamship “Santa Clara” and the steamship “Roanoke”?

A. It owns them both.

Q. Mr. Doe, you heard the offer of these wireless messages in evidence. Run over those that are signed Doe and see whether or not you sent those messages, either Doe or C. P. Doe.

A. Here is the first one (pointing).

Q. You sent Libelants’ Exhibit No. 6?

A. I did.

Q. Libelants’ Exhibit No. 7? A. Yes, sir.

Q. Libelants’ Exhibit No. 15? A. Yes, sir.

Q. Libelants’ Exhibit No. 17? A. Yes, sir.

Q. Now, these messages that are addressed to Doe, or C. P. Doe, will you run those over and see if you received those?

A. Libelants’ Exhibit No. 1, yes. Exhibit No. 2, yes. Exhibit No. 3, yes. Exhibit No. 4, yes. Ex-

(Testimony of Charles P. Doe.)

hibit No. 16, yes. Exhibit No. 17, yes.

Mr. SOOY.—Q. You received how many of those, Mr. Doe? A. I did not keep track of them.

Q. Identify all of those received by you. I have got Exhibit 1, 2, 3, 4, as received by you. Will you turn back and read his answer, Mr. Reporter? (The Reporter reads the previous [108—13] answer.) You have got Exhibit 17 as being sent and received there? A. 17 was sent.

Mr. WALL.—Q. Mr. Doe, you were subpoenaed to bring the pay-roll and the crew list of the steamer “Santa Clara.” Have you those books with you?

A. I have, yes.

Mr. WALL.—I want to show by Mr. Doe that these people were on the vessel at the time and in what capacity and at what rate of pay on the “Santa Clara” as members of the crew of that vessel on the 9th and 10th and 11th day of April, 1913.

Q. Could you read the names off and the rate of wages?

Mr. LEVY.—Mr. Doe does not know the particular libelants who were members of the crew. He just knows what names he has on that sheet of paper there. You understand that, don't you, Mr. Wall?

Mr. WALL.—Q. What is this paper that you have there, Mr. Doe?

A. The pay-roll of the steamer “Santa Clara.”

Q. And you are president of the North Pacific Steamship Company? A. Yes, sir.

Q. Oskar Johansen, what capacity does he appear

(Testimony of Charles P. Doe.)

on the pay-roll of the "Santa Clara," Mr. Doe, and for what wages?

A. He was a seaman on the deck department.

Q. What wages? A. \$50 a month.

Q. H. Meislahn? A. Also seaman, \$50.

Q. P. Cain? A. Seaman, \$50.

Q. F. G. Palmer? A. I have an F. Palmer.

Q. What is F. Palmer down there?

A. Seaman, \$50.

Q. All the seamen get \$50?

A. Yes, sir, that is the standard pay.

Q. George K. Bekker, or G. K. Bekker?

A. We have that [109—14] man all right, seaman also, \$50.

Q. Christen Christensen, or C. Christensen?

A. Also seaman at \$50.

Q. Alf Johnsen, or A. Johnsen?

A. A. Johnsen, seaman, \$50.

Q. A. C. Andersen? A. Also seaman.

Q. E. Anderson? A. Seaman.

Q. H. Andreasen? A. Seaman.

Q. A. Fraser? A. Fireman.

Q. And wages? A. \$55.

Q. All firemen are paid the same? A. Yes, sir.

Q. O. Havness? A. I have not got that name.

Q. Have you got the signature for that man?

A. Yes, sir, I have the signature.

Q. O. Hansen, what was he?

A. Deck watchman, \$50 a month.

Mr. WALL.—Note there in the record we shall ask leave to amend the libel to substitute the name of O.

(Testimony of Charles P. Doe.)

Havness to O. Hansen.

The WITNESS.—This man Hansen to whom I have just testified appears to have been discharged on the first of April, and for that reason appears upon our April pay-roll. It does not appear that he was re-employed and it does not show that he was on board the ship on the 10th of April.

Mr. SOOY.—Q. Does it appear that he was on board the vessel on the 9th?

A. He was discharged on the first of April.

Q. So that during the month of April then at any time during 1913 he was not on the vessel as far as this pay-roll shows, Mr. Doe?

A. No, sir, not after the first of April.

Mr. WALL.—Q. M. Staly?

A. It is A. Fahey. [110—15]

Q. What was he employed at?

A. He was a wiper at \$45.00.

Mr. WALL.—We shall ask leave to amend the libel to change the name of Staly to Fahey; that is my interpretation of his signature.

Mr. SOOY.—We object to that; we object to your making any statement at this time.

Mr. WALL.—I give notice now that I will ask to amend the libel in that respect.

Mr. SOOY.—I object to any testimony as to any one being aboard this vessel, unless that is the person mentioned as one of the libelants.

Mr. WALL.—Q. W. Kremer? A. Oiler, \$45.

Q. V. Matson? A. Fireman, \$55.

Q. J. Kotcharin? A. He was a watchman.

(Testimony of Charles P. Doe.)

Q. Wages? A. \$50.

Q. C. Gibson?

A. Waiter as well as watchman; watchman is his proper designation.

Q. Wages? A. \$35.

Q. A. Sjogren? A. Second officer.

Q. Wages? A. \$85.

Q. B. Frankel? A. Purser.

Q. Wages? A. \$90.

Q. K. G. Clark? A. Waiter.

Q. Wages? A. \$30.

Q. A. S. Caskey? A. Oiler.

Q. Wages? A. \$45.

Q. S. B. Nilsen? A. Oiler, \$45.

Q. George M. Reed, or G. M. Reed?

A. Second assistant engineer, \$90.

Mr. SOOY.—Q. Is he on the pay-roll, Mr. Doe?

A. Yes, sir, [111—16] at the time of the accident.

Mr. WALL.—Q. G. W. Jacobs?

A. I have a G. Jacobs.

Q. What is he?

A. Third assistant engineer, \$80.

Q. A. Disher?

A. First assistant engineer, \$100.

Q. J. E. Johnson? A. Third mate, \$70.

Q. W. E. Pitts? A. Third cook, \$45.

Q. G. Drew? A. Not Drew, but Dreid.

Q. What was his capacity and pay, Dreid, or Drew?

(Testimony of Charles P. Doe.)

Mr. LEVY.—I object to that question as not material.

Mr. WALL.—You can have all the objections at any time you want to all questions.

Mr. LEVY.—I will conduct the objections; you conduct the examination, Mr. Wall.

Mr. WALL.—I have stated for the record that it can be stipulated that any objection that counsel chooses to be made to any of the questions can be considered as having been made and can be made upon the trial of the case.

Mr. LEVY.—It takes both parties to stipulate to it. I want that objection to appear.

A. This man did not join the vessel until after the accident; this party did not join the vessel until the 16th.

Mr. LEVY.—Q. Who are you talking about?

A. Mr. Dreid.

Q. There is no Dreid.

Mr. SOOY.—Q. When did Dreid join?

Mr. WALL.—If we cannot conduct this examination in the right way we will have to have the Commissioner present here to conduct this examination.

Mr. LEVY.—I am not going to be lectured by you. I think my objections are properly made.

Mr. WALL.—We do not want any cross-examination on your [112—17] part.

Mr. LEVY.—Don't tell me what to do.

Mr. WALL.—I will have the Commissioner tell you what to do.

Q. Answer that question subject to any objection

(Testimony of Charles P. Doe.)

that the other side makes.

Mr. LEVY.—I object to the question as not comprehensible and indefinite.

Mr. WALL.—Q. Answer the question subject to the objection, Mr. Doe?

A. G. Dreid appears as a waiter for \$30.

Q. Then he appears to have been on the vessel on the 10th of April, Mr. Doe?

A. He joined on the 16th of April.

Q. Then he does not appear on the pay-roll of the vessel as having been on the 10th of April?

A. He does not.

Mr. WALL.—We do not want to get anybody on there who was not on the 10th.

Q. A. G. Clarke, or A. Clarke?

A. Wireless operator.

Q. What was his pay? A. \$40.

Q. J. Martin? A. Second cook, \$60.

Q. E. Andrews? A. Pantryman, \$50.

Q. J. Pitts? A. First cook, \$75.

Q. R. Tennant? A. Mess boy, \$35.

Q. What was the total pay-roll of the "Santa Clara" on the 10th of April the officers and crew?

Mr. SOOY.—We object to that as incompetent, irrelevant and immaterial, and as foreign to the issues here.

Mr. WALL.—Q. Go ahead, Mr. Doe, and answer the question.

A. I don't understand the question, Mr. Wall.

Q. What was the total amount of pay of the offi-

(Testimony of Charles P. Doe.)

cers and crew of the "Santa Clara" on the 10th of April, 1913?

A. Do you [113—18] mean for one day alone?

Q. The rate of pay of each officer and man when added up made what total?

A. I don't know without adding up the figures.

Q. You have the figures, have you not?

A. No, sir, we do not keep our records that way.

Q. What did the master receive? A. \$175.

Q. What did the first officer receive? A. \$100.

Q. And the chief engineer? A. \$150.

Q. And the chief steward? A. \$90.

Q. What was her complement as seamen?

A. Eight.

Q. And of firemen? A. Three.

Q. Wipers? A. Two.

Q. Oilers? A. Three.

Q. Waiters?

A. That depended upon the circumstances; we did not have always the same number.

Q. I mean on the pay-roll? A. I have five.

Q. Cooks? A. Three.

Q. Watchmen of different kinds? A. Two.

Q. Did you have anybody else on board of her as officers or crew?

A. I forget now who you asked me.

Mr. SOOY.—This is all, of course, subject to the same objection.

A. (Contg.) I have lost track, Mr. Wall, of those you have designated. The second and third officers apparently we overlooked at \$85 and \$70.

(Testimony of Charles P. Doe.)

Mr. WALL.—Q. How many assistant engineers?

A. The second and third engineers at \$90 and \$80. You did not include the two wireless operators, one at \$90, who acted as purser and the other at \$40.

Q. That comprised her complement of officers and crew?

A. That [114—19] was the ordinary crew, I presume, on board on that occasion.

Mr. WALL.—That is all.

Cross-examination.

Mr. SOOY.—Q. Mr. Doe, how many of the names mentioned that belonged to the crew were on board the vessel on April 9th, 10th and 11th; that is, how many were not there of the names you have mentioned in your direct examination. How many were not on board the vessel on the 9th, 10th and 11th. Mr. Reed, I believe, you mentioned?

A. Yes, sir, Mr. Reed was there at the time; he was discharged after this accident.

Q. After the accident?

A. Yes, sir, another man took his place.

Q. Mr. Kotcharin?

A. He was there. He took the place of a Mr. Hansen whose name is on the complaint.

Q. Now, Mr. Hansen was not on either the "Santa Clara" or the "Roanoke" on April 10th; is that right?

A. The record here shows that Mr. Hansen whose signature appears upon the document which Mr. Wall has was paid off the first day of April.

(Testimony of Charles P. Doe.)

Q. And therefore was not connected with the "Santa Clara" during the month of April, 1913?

A. As far as these records show he was not.

Mr. LEVY.—May I ask a question?

Mr. WALL.—Certainly.

Mr. LEVY.—Q. Mr. Doe, you do not know that any of these men were actually on board the "Santa Clara" during that day, do you?

A. Of my personal knowledge, no, I was not there.

Q. You are only testifying from some paper you have? A. From the records of the company, yes.

Mr. SOOY.—Q. From the pay-roll? [115—20]

Mr. WALL.—No, he said from the records of the company.

Mr. SOOY.—I can find out what records they are.

Q. Answer the question.

A. What was the question?

Q. Read the question, Mr. Reporter.

(The Reporter reads the question.)

A. Yes, sir, from the pay-roll.

Q. Of the vessel, the "Santa Clara"?

A. Yes, sir.

Q. Now, who makes that pay-roll out, Mr. Doe?

A. The chief officers in charge of the different departments.

Q. Thereafter it is filed among the records of the North Pacific Steamship Company? A. It is.

Q. Whatever knowledge you have of who was aboard this vessel, the "Santa Clara" on April the 10th is contained in that pay-roll which you are testifying from now and from no other information?

(Testimony of Charles P. Doe.)

A. Yes, sir.

Q. That is true, is it, Mr. Doe?

A. Yes, sir, that is true.

Redirect Examination.

Mr. WALL.—Q. What are the other papers there, Mr. Doe, from which you have also testified?

A. These are a part of the pay-roll containing the names of people who were dismissed during the month.

Q. Where did they get the money to pay off these people whom you have stated were on the pay-roll?

A. From our office.

Q. From the North Pacific Steamship Company?

A. Yes, sir.

Q. Of which you are president? A. Yes, sir.

Q. And you turned that money over to whom to pay? They are paid in the office?

A. No, sir, paid on board the steamer.

Q. And you turned the money over to who?

A. Those on the regular pay-roll are paid on board the ship. These that [116—21] are on the yellow slips to which you refer are paid in the office.

Q. To whom is the money given to pay those who are paid off on the ship?

A. As a rule to the purser, but not always.

Q. And the purser goes by what in paying out the money? A. By this pay-roll.

Q. And you pay some of those off—some of those are paid off in the office according to these slips which you have referred to? A. Yes, sir.

Q. What names appear on those slips as being paid

(Testimony of Charles P. Doe.)

off in the office; B. Frankel?

A. Yes, sir, there is lots of them.

Q. Read them off, those that are on the yellow slips?

Mr. SOOY.—We object to the witness reading off anything on the yellow slips if they do not appear as any of the libelants in the libel in this case, and as being incompetent, irrelevant and immaterial; they might have been there as passengers or any other way.

Mr. WALL.—Q. Go ahead and answer the question.

A. B. Porter.

Q. And who is that countersigned by?

A. It is not countersigned. It is just the regular time check.

Q. I do not want any, Mr. Doe, that are not on the libel?

A. These are all off the libel; these are people practically all discharged prior to this case. Porter served one day.

Q. He is not on the libel?

A. No, sir, I cannot select them for you.

Mr. SOOY.—That is my objection, Mr. Wall.

The COMMISSIONER.—Just give all the names from the libel. [117—22]

Mr. WALL.—He has had that from the libel a long time ago, Mr. Commissioner. He said he testified in regard to some of these from his checks.

Q. Now, C. Gibson is one whose name is on one of the yellow slips, is it not?

(Testimony of Charles P. Doe.)

A. Yes, sir, you have my testimony of Gibson.

Q. He was paid in the office? A. Yes, sir.

Q. Who was the time check countersigned by?

A. It does not require any countersign. It is simply sent by the purser and the steward who happened to have the man in his department.

Q. And G. Reed is one, and he was paid off in the office, was he not?

A. Yes, sir, I have already testified about him.

Q. And those were the only two about whom you testified from the yellow slips there as to having been paid in the office? A. I think so.

Mr. WALL.—That is all.

[Testimony of B. Frankel, for Libelants.]

B. FRANKEL, called for the libelants, sworn.

Mr. WALL.—Q. You were on the “Santa Clara” on April the 10th? A. I was.

Q. In what capacity?

A. Purser and wireless operator.

Q. And your wages were what?

A. \$90 a month.

Q. I will show you what purports to be certain wireless messages sent and received and ask you to look those over and state what you know in regard to having either sent or received any of those messages or whether while on board of the “Santa Clara” there were any of those messages that you did not send or receive that you heard, and refer to them [118—23] by the numbers up in the upper left-hand corner here.

A. No. 1 I heard sent from the San Luis Obispo

(Testimony of B. Frankel.)

station about the steamer "Roanoke." Also No. 2—

Mr. SOOY.—Just a moment now. No. 1, what do you mean by saying you heard it sent?

Mr. WALL.—That is what I would rather not have you do until I get through with my examination. You can cross-examine him when I finish with the direct examination.

Mr. SOOY.—My point is, Mr. Commissioner, I have a right to cross-examine the witness on each one of these documents after the direct examination is finished. They are already in evidence. That is my position.

The COMMISSIONER.—It only relates to the order in which the cross-examination shall be made. I suppose each message is distinct and separate and therefore there is no particular objection, is there, Mr. Wall?

Mr. WALL.—I would rather conduct my direct examination and he can make his memoranda for cross-examination.

The COMMISSIONER.—That would be the more orderly way to have the witness testify to all the facts Mr. Wall wishes him to testify to and then you can cross-examine him.

The COMMISSIONER.—That would be the more orderly way to have the witness testify to all the facts Mr. Wall wishes him to testify to and then you can cross-examine him.

Mr. SOOY.—Then after he asks one question before he can ask any further questions I have a right to stop his direct examination and insist on my cross-

(Testimony of B. Frankel.)

examination to find out whether the witness is testifying from his own knowledge or hearsay, or whether he has any knowledge of the subject at all. One of the fundamental rules of testimony, of evidence, is that when a witness starts to talk about a document, the document must be passed to the counsel on the opposing side and he have a right to cross-examine him before [119—24] any further testimony is taken.

Mr. WALL.—These documents have all been passed to the counsel on the opposing side and thoroughly gone into, and now I am only asking this man to testify to what he knows of his own knowledge. The proper way to do is to wait until I get through.

The COMMISSIONER.—Proceed.

A. (Contg.) No. 1, I heard the station at San Luis Obispo send the message about the steamer "Roanoke."

Mr. SOOY.—I object to it on the ground that the testimony of the witness is hearsay.

The COMMISSIONER.—Let the objection be noted. Proceed with the next question.

Mr. SOOY.—If you will let me bring it out by asking the witness a few questions I might not object to this.

Mr. WALL.—I will state now that the other side can have any objections they want to any of these questions both now and upon the trial of the case.

The COMMISSIONER.—Go ahead.

A. (Contg.) No. 2, I also heard the steamer "Roanoke" send to the station at Point Arguello.

(Testimony of B. Frankel.)

Mr. SOOY.—I object to that on the ground that it is hearsay.

The COMMISSIONER.—It may be ruled by the Court that it is hearsay, but it will go in this way.

A. (Contg.) No. 3, I also heard the steamer “Roanoke” send to the station at Point Arguello.

Mr. SOOY.—The same objection.

A. (Contg.) No. 4, I know the steamer “Roanoke” sent to the station at San Luis Obispo. [120—25]

Mr. SOOY.—The same objection.

A. (Contg.) No. 5 was received by me on board the steamer “Santa Clara” from the steamer “Roanoke.” No. 6, I heard sent from Point Arguello to the captain on the steamer “Roanoke.”

Mr. SOOY.—Objected to as hearsay and not the best evidence.

A. (Contg.) No. 7, I don’t remember of hearing that message.

Mr. SOOY.—We ask that that answer go out.

Mr. WALL.—It can go out.

A. (Contg.) No. 8 was a message sent from the steamer “Santa Clara” to the steamer “Roanoke.”

Mr. SOOY.—I ask that that go out as being a conclusion of the witness as to what the message is. The message speaks for itself and further that it is hearsay.

The COMMISSIONER.—Go on.

A. (Contg.) No. 9 was sent from the steamer “Roanoke” to the steamer “Santa Clara.” It was

(Testimony of B. Frankel.)

received by myself on board the steamer "Santa Clara."

Mr. SOOY.—The same objection.

A. (Contg.) No. 10 was also sent from the steamer "Roanoke" to the steamer "Santa Clara" and received by myself.

Mr. SOOY.—Objected to upon the ground that it is not shown that the witness knows where it was sent from.

A. (Contg.) No. 11 was sent from the steamer "Santa Clara" to the captain on the steamer "Roanoke" by myself. No. 12 was sent by myself from the steamer "Santa Clara" to the captain on the steamer "Roanoke." No. 13 was received by myself on board the steamer "Santa Clara" from the steamer "Roanoke." [121—26]

Mr. SOOY.—We object to that and ask that that answer be stricken out on the ground that it is not shown that the witness can tell where the message was received from.

A. (Contg.) No. 14, this message was sent from the steamer "Santa Clara" to the steamer "Roanoke" also by myself. No. 15, was received aboard the steamer "Santa Clara" by myself from the station at Point Arguello.

Mr. SOOY.—We object to the answer and ask that that portion of it as to where the message was sent from be stricken out from the record upon the ground that it is not shown that the witness can tell, or ascertain, or have any knowledge of where it was sent from to him.

(Testimony of B. Frankel.)

A. (Contg.) No. 16 was sent from the steamer "Santa Clara" by myself to the station at San Luis Obispo. No. 17, was received from the station at San Luis Obispo by myself going to the captain of the "Santa Clara." No. 18 was sent from the steamer "Santa Clara" by myself to the captain on board the "Roanoke."

Mr. SOOY.—Now, we object to any testimony of any of the aerograms or telegrams which the witness has just testified in reference to and to those telegrams or aerograms that may have been exchanged between the two vessels, the "Santa Clara" and the "Roanoke," or that may have been exchanged between either of the vessels and any other wireless station unless it be shown that those telegrams or aerograms were received by Mr. Doe, or as in an official capacity by the North Pacific Steamship Company as tending to bind the North Pacific Steamship Company and the two vessels or an exchange of aerograms between two outside parties not connected with the suit in any way. [122—27]

The COMMISSIONER.—The objection will be noted.

Mr. WALL.—How long have you been a wireless operator? A. About three years.

Q. And during that time what vessels have you served on?

A. About one dozen. Do you want the names?

Q. What vessels have you served on?

A. The steamer "Carlos," steamer "Santa Rosa," steamer "Lansing," "Falcon," "Roanoke," "Wil-

(Testimony of B. Frankel.)

helmina," "Santa Clara." I believe that is all so far.

Q. State whether or not from your experience you have been able to learn what vessels are sending messages that you hear.

Mr. SOOY.—We object to that question as calling for the conclusion of the witness.

Mr. WALL.—I qualified him as an expert and I want his conclusions.

Mr. SOOY.—I will make the further objection—

The COMMISSIONER.—Let the question be answered and put your objection in.

Mr. SOOY.—There has been no proper foundation laid for the question.

The COMMISSIONER.—That all appears in the record. The Court will determine that when it comes to consider the evidence, I suppose.

Mr. WALL.—Q. Read the question to the witness, Mr. Reporter.

(The Reporter reads the question.)

A. There are various means of telling which station is talking. The main way is the calls of the station that is sending, also by the tune of their instrument, the wave length, and strength and operator's signature.

Mr. SOOY.—I ask that that go out as not responsive to [123—28] the question.

Mr. WALL.—Q. Anything else? A. No, sir.

Q. What port did the "Santa Clara" leave prior to the time that she went to where the "Roanoke" was?

(Testimony of B. Frankel.)

A. She left San Francisco on the 9th bound for Port Harford.

Q. Did you go direct to Port Harford?

A. No, sir.

Q. State what happened.

A. While on watch on the morning of April 10th, why, a message—

Q. (Intg.) April 10th, 1913?

A. 1913, a message was received aboard the "Santa Clara."

Q. About what time in the morning?

A. About 10 A. M.

Q. What message was that?

A. To my remembrance the message was to Captain Jessen of the "Santa Clara."

Mr. SOOY.—We ask that any evidence as to the contents of that message be stricken out as not the best evidence.

Mr. WALL.—Q. Did you receive that message?

A. Yes, sir.

Mr. SOOY.—The same objection.

A. (Contg.) The body of that message was "two miles south of Point Arguello lost wheel come to our assistance, signed Dickson of the 'Roanoke.' "

Q. Is that message in that lot there?

A. I believe so; Exhibit No. 5 is that message.

Q. At the time that you got that first message where was the "Santa Clara" then?

A. About 18 miles north of Point Piedros Blancas.

Q. And about how far in time from Port Harford?

(Testimony of B. Frankel.)

A. About four hours, I should judge.

Q. And after the message was received what was done with the "Santa Clara"?

A. That I could not say. I was in the wireless room at the time and I could not say what was going [124—29] on on the outside.

Q. Well, how was the weather at that time?

A. The sea was smooth, but it was very foggy; a little swell coming up from the north.

Q. Did the fog increase, or decrease as you proceeded?

A. Well, at times it decreased and at times it increased.

Q. How long was it before you arrived at the "Roanoke," if you did arrive at the "Roanoke"?

A. Well, we arrived there at about 6 P. M.

Q. When you got there what was the condition of the weather as to sea?

A. It was very foggy, a swell coming up from the north and that is about all.

Q. After you got the first message state what the fact was with regard to there being other vessels in the vicinity.

A. As soon as we got a line aboard the "Roanoke"—

Q. (Intg.) When you got the first message from the "Roanoke" from that time forward state what the fact was as to there being other vessels in the vicinity.

A. In about two hours there were several other lumber schooners calling up the "Roanoke" if they

(Testimony of B. Frankel.)

could be of any assistance.

Mr. SOOY.—We ask that that go out as incompetent, irrelevant and immaterial.

Mr. WALL.—What others called up?

A. The schooners—

Mr. SOOY.—(Intg.) The same objection.

The WITNESS.—Can I answer that question?

Mr. WALL.—Q. Yes.

A. The “Willamette,” the “Norwood” and I believe the “Columbia” was around.

Mr. SOOY.—Q. Do you know whether the “Columbia” was the one?

A. I could not say, but I think I heard her calling.

Q. You are not sure of that?

A. I am not sure of that. [125—30]

Mr. WALL.—Q. State whether or not any messages were received that you heard between the “Roanoke” and the “Willamette.”

Mr. SOOY.—We object to that as incompetent, irrelevant and immaterial as to what messages may have been exchanged as between anybody and the “Roanoke” or the “Santa Clara” unless it be between the “Roanoke” and the North Pacific Steamship Company.

A. I believe there was a number of messages between the “Willamette,” “Norwood” and “Roanoke.”

Mr. WALL.—Q. What was said between the “Roanoke,” if you know? A. I—

Mr. SOOY.—(Intg.) Q. Do you know?

(Testimony of B. Frankel.)

A. I could not say positively, but I have a slight remembrance the message to the "Willamette" said, would need her assistance to stand by.

Mr. SOOY.—We object to his slight remembrance and ask that the answer of the witness be stricken from the record on the ground that the witness has no recollection in regard to what the messages were and further upon the ground that it is hearsay.

The COMMISSIONER.—It will go in and the objection will be noted.

Mr. WALL.—Q. State whether or not you saw anything of the "Willamette" after you arrived where the "Roanoke" was?

A. After we arrived at the "Roanoke" and got a line aboard, the "Willamette" showed up and seeing that we had the "Roanoke" in tow, why, she proceeded on her way.

Mr. SOOY.—We object to anything as to what the "Willamette" did and ask that it be stricken from the record as incompetent, irrelevant and immaterial and hearsay and [126—31] is the conclusion of the witness.

Mr. WALL.—Q. What was the condition of the weather while you were taking the "Roanoke" in tow?

A. Very heavy fog and swell from the north.

Q. What was the position of the "Roanoke" at the time you picked her up with reference to objects on shore?

A. I should judge about two miles south of Point

(Testimony of B. Frankel.)

Arguello, very near shore though, you could hear the breakers.

Q. And upon what did you base your judgment to be about two miles from Point Arguello?

A. From past experience.

Q. Could you hear the fog horn?

A. Very strong.

Q. At Point Arguello station? A. Yes, sir.

Q. State what your experience has been in passing that locality, that part of the coast during the month of April.

Mr. SOOY.—I object to that as incompetent, irrelevant and immaterial, as to what the experience of the witness may have been any other time off this point.

Mr. WALL.—Q. Go ahead and answer the question.

A. In answer to that question—have you reference to the weather?

Q. Yes.

A. Well, the weather around Point Arguello in the month of April is a slight northerly swell at times foggy, that is about all.

Q. How many times did you say you had been up there during the month of April?

A. I should judge about eight times.

Q. What time of day was it that the “Roanoke” was taken in tow?

A. I should judge about 6 P. M.

Q. After she was taken in tow what was done with her?

(Testimony of B. Frankel.)

A. She was taken into Port San Luis or Port Harford.

Q. What time did you turn in that night?

A. 1 A. M., I [127—32] believe, April the 11th.

Q. Had she arrived there when you turned in?

A. No, sir.

Q. How long were you steaming down to where the "Roanoke" was after the first message was received on the "Santa Clara"?

A. I should judge about seven hours, or so.

Q. How long were you on the "Santa Clara" altogether during your experience on her?

A. About six months, I believe, five or six months.

Q. And during that time you acted as purser and wireless operator? A. Yes, sir.

Q. And what was her average monthly pay-roll during the time you were on her?

A. I should judge about \$2800.00.

Mr. SOOY.—Do you know whether—

Mr. WALL.—(Intg.) That is what I object to, your cross-examining the witness during my examination.

Mr. SOOY.—What does he know about it.

Mr. WALL.—I do not want you to interrupt my examination.

Q. And you were purser on the vessel you say for six months? A. Yes, sir.

Q. During that time did you have anything to do with paying off? A. Yes, sir.

Q. You paid off the officers and crew?

A. Yes, sir.

(Testimony of B. Frankel.)

Q. You know what amounts you paid out?

A. Yes, sir.

Q. And you know that the average monthly payroll was between what figures during the time you were there?

A. Between \$2,400.00 and \$2,800.00 or \$3,000.00.

Q. You know that yourself from your experience in paying off? A. Yes, sir.

Mr. SOOY.—That is all I wanted to know.

Mr. WALL.—If you had waited you would have got it. [128—33]

Mr. SOOY.—You did not lay the foundation.

Mr. WALL.—That is where you would have the benefit of that on your cross-examination.

Mr. SOOY.—I know, but you can bring that out and shorten it.

Mr. WALL.—I say you can have any objection to the questions.

Mr. SOOY.—Against you.

Mr. WALL.—You can have any objection to any question of my examination that you want.

Mr. SOOY.—I have taken testimony out here months at a time, Mr. Wall, and I understand how to examine the witness.

Mr. WALL.—That is all.

Cross-examination.

Mr. SOOY.—Q. What vessel did you first work on when you became a Marconi wireless operator?

A. The first vessel I was on was equipped with the United Wireless on the steamer “Carlos.”

Q. Was it at the time she was owned by the J.

(Testimony of B. Frankel.)

Homer Fritch Company? A. Yes, sir.

Q. Was Captain John Roberts master of her at that time? A. Yes, sir.

Q. How long did you work there?

A. I believe four months.

Q. What did you quit for?

A. They transferred me to the steamer "Santa Rosa."

Q. Who transferred you?

A. The United Wireless.

Q. For what reason?

A. Well, that I could not say.

Q. Was it not the fact that it was on account of the objection of the J. Homer Fritch Company to you?

A. No, sir, the J. Homer Fritch Company were the owners for [128—34] about two months and the Olson & Mahony concern took her over.

Q. You were transferred prior to the time that the Olson & Mahony people took her over?

A. I was transferred after.

Q. After the Olson & Mahony people took her over? A. No, sir.

Q. Did you have any trouble with the J. Homer Fritch Company while you were on board the "Carlos"? A. No, sir.

Q. After you were transferred to the "Santa Rosa" how long were you on her?

A. I believe it was about a month.

Q. Were you on her at the time she went on the rocks? A. Yes, sir.

Q. Are you the man who received the messages at

(Testimony of B. Frankel.)

the time she was on the rocks? A. Yes, sir.

Q. And the man who transferred those messages?

A. Yes, sir, I did.

Q. You admit all that?

A. I do, at least if that is not hearsay or newspaper report error. The actual messages I admit of being guilty of doing so; not guilty, but being the operator.

Q. In other words, you received and sent all the messages? A. The official messages.

Q. Were there any messages sent from the "Santa Rosa" that you did not see?

A. That I could not say.

Q. Were there any other wireless operators on board? A. No, sir.

Q. Was there any one who could receive a message? A. No, sir.

Q. Then you must have received and sent all official messages? A. All official messages.

Q. Didn't you receive and send all messages from the "Santa [130—35] Rosa"? A. Yes, sir.

Q. Then you did? A. Yes, sir.

Q. When did you go from the "Santa Rosa"?

A. They transferred me to the "Lansing."

Q. How long were you on the "Lansing"?

A. I believe 28 days.

Q. What happened there?

A. I asked for relief.

Q. For what reason?

A. I objected to the boat.

Q. For what reason?

(Testimony of B. Frankel.)

A. I did not like the run she was on.

Q. What run was she on?

A. Oleum to Panama.

Q. Why didn't you like it?

A. It was a little too warm for me.

Q. Was there any objection to your services there?

A. No objections whatever.

Q. No objections whatever?

A. None whatever.

Q. None whatever, perfectly satisfactory?

A. Yes, sir.

Q. Where did you go from there?

A. From there I went on the steamer "Falcon."

Q. How long were you on board her?

A. About a month and a half, I believe.

Q. Where did she run?

A. San Francisco to Portland.

Q. Who was she owned by?

A. She was owned by the Charles Nelson Company and chartered to the American-Hawaiian Company.

Q. What did you quit her for?

A. I was transferred to the steamer "Roanoke."

Q. Who transferred you?

A. Well, I asked for a transfer.

Q. Why?

A. I was to become purser on the steamer "Roanoke" at the time.

Q. In addition to being a wireless operator?

A. Yes, sir.

Q. Are you still purser on the "Roanoke"?

(Testimony of B. Frankel.)

A. I am not. [131—36]

Q. When did you leave the "Roanoke"?

A. I relieved the regular purser at the time. He took a vacation, I think, at the time.

Q. When did you leave the "Roanoke"?

A. I left the "Roanoke" on February, 1911—I mean 1912.

Q. Is it not a fact that you were transferred from the "Falcon" to the Roanoke"?

A. I was transferred at my own request. I asked for a transfer myself.

Q. You asked for the transfer? A. Yes, sir.

Q. Then you were not transferred by the company? A. No, sir, I asked for the transfer.

Q. You asked for the transfer? A. Yes, sir.

Q. And is it not a fact that you went to the North Pacific Steamship Company and asked for a position on the "Roanoke"? A. I did.

Q. So you were not transferred?

A. I was in a way and in a way I was not.

Q. That is the fact, you went to the North Pacific Steamship Company and asked for a position, did you not? A. I did.

Q. How long did you remain on the "Roanoke"?

A. I relieved the regular purser; I believe it was a month.

Q. And then were you discharged from the "Roanoke"?

A. I don't know if I was discharged or not. The regular purser came back and I went off.

Q. Were you requested to leave by the manage-

(Testimony of B. Frankel.)

ment of the North Pacific Steamship Company?

A. I was not requested, but I seen the purser was to take his old position and it was understood that I was to go off as soon as he came back.

Q. Then what was the next vessel you worked on?

A. I was to take charge of the Marconi station in the city. [132—37] here.

Q. Take charge of what?

A. Take charge of the station at 43rd and Clement Street.

Q. What do you mean by take charge of the station?

A. I was supposed to look out for the business there.

Q. What was your business there?

A. Wireless operator.

Q. How much money did you draw there?

A. \$75, I believe.

Q. How long did you work out there?

A. Six weeks and then I asked for a transfer to the steamer "Wilhelmina."

Q. You asked for a transfer? A. Yes, sir.

Q. From that station to the "Wilhelmina"?

A. Yes, sir.

Q. How long were you on the "Wilhelmina"?

A. 10 months.

Q. What did you quit the "Wilhelmina" for?

A. I did not like the—there were various different reasons.

Q. Give me all of them.

A. Well, one reason that I was taken off the "Wil-

(Testimony of B. Frankel.)

helmina" to be given the purser of the "Hilonian." It was not given to me and it made me kind of sore at the time.

Q. Kind of angry you mean?

A. Yes sir, then I went over to see Mr. Doe for a position in his company and I agreed to go out on the steamer "Santa Clara."

Q. Is it not a fact that you had trouble with the company? A. No, sir.

Q. Nothing at all? A. No, sir.

Q. No trouble with them? A. No, sir.

Q. No trouble in regard to finances?

A. No, sir.

Q. Nothing of that kind? A. No, sir.

Q. The only reason you quit them at all was that you had some difficulty with another purser?

A. No, sir, I was to be given the preference of a position on another ship, which [133—32] was not given to me and I did not think that was right and I wanted to get out of the Matson Navigation Company for that reason.

Q. Where were you born? A. San Francisco.

Q. How old are you? A. 23.

Q. Are you a married man? A. Single.

Q. You are 23 years old? A. Yes, sir.

Q. Where were you educated?

A. San Francisco.

Q. By public school? A. Yes, sir.

Q. What school did you go to?

A. Horace Mann Grammar and Polytechnic.

Q. Your people live here in San Francisco?

(Testimony of B. Frankel.)

A. No, sir, my mother is in the country.

Q. Your father lives here? A. Yes, sir.

Q. What did you do prior to the time you became a wireless operator?

A. I was going partly to school and partly working for Lipman Brothers at the time.

Q. How do you spell your name?

A. F-r-a-n-k-e-l.

Q. Now, how long had you been on the "Santa Clara" up to April the 10th?

A. From December, 1912, to April, 1913.

Q. You were also purser on the "Santa Clara," were you? A. Yes, sir.

Q. On April 10th you say you got a message, received a message as wireless operator on board the "Santa Clara" stating that the wheel on the "Roanoke" was broken just off Point Arguello. Is that so? A. Yes, sir.

Q. That was about 10 o'clock in the morning?

A. Yes, sir.

Q. What did the ship do immediately upon receipt of this message? A. That I could not say.

Q. What became of the ship, where did she go from that time? [134—39]

A. That I could not say.

Q. You could not remember at all what she did?

A. Well, I was in my room.

Q. You could not tell from being in your room whether the ship turned about or went on down to Port Harford?

A. She went right on straight south.

(Testimony of B. Frankel.)

Q. She went right on straight south?

A. Yes, sir.

Q. Kept right on her way? A. Yes, sir.

Q. Where were you at the time of receiving the first message?

A. About 18 miles north of Piedras Blancas.

Q. About 18 miles? A. Yes, sir.

Q. Where was the "Roanoke" as to her position?

A. She reported two miles south of Point Arguello.

Q. How far away, how far south was the "Roanoke" from the "Santa Clara" at the time of the receipt of that message? A. That I could not say.

Q. Approximately how far?

A. Well, about 38 miles, I should say; 40.

Q. About 35 or 40 miles? A. Yes, sir.

Q. You are acquainted with the coast, are you not?

A. Yes, sir.

Q. Then you say that the "Santa Clara" kept right on her course to Port Harford?

A. No, sir, she did not stop at Port Harford, she went straight down to the "Roanoke."

Q. She went straight down to the "Roanoke" and did not stop at Port Harford? A. Yes, sir.

Q. How many knots does the "Santa Clara" make down the coast?

A. It all depends upon the weather; an average of 9 knots.

Q. On April 10th what could she make?

A. About 9 knots.

Q. You say there was a stiff northerly wind blowing that [135—40] day?

(Testimony of B. Frankel.)

A. No, sir, a swell gradually coming up.

Q. Did the wind help her much on her way down?

A. No, sir.

Q. There was not enough wind so that it made much difference in her speed?

A. Not the speed, no.

Q. You were from 10 o'clock until 6 o'clock—you were from 10 o'clock that morning until 6 o'clock that evening before you got down to the "Roanoke"? A. Yes, sir.

Q. Is that a fact? A. Yes, sir.

Q. And all these messages you sent and received you sent and received between 10 o'clock in the morning and 6 o'clock that night? A. Yes, sir.

Q. Did you leave your room at all during that time?

A. I had the regular operator relieve me while I went down for my dinner.

Q. He was the regular operator?

A. I was supposed to be in charge of the wireless and the other operator was just my partner.

Q. You had him relieve you when you went down to dinner? A. Yes, sir.

Q. What time was that about? A. About 6.

Q. Did he send or receive those messages you testified to? A. He received one.

Q. Which one was that?

A. "Exhibit No. 17."

Q. Let me see it. A. Yes, sir (handing).

Q. Now, were you present at the time this message was received? A. I was.

(Testimony of B. Frankel.)

Q. And he received that while you were standing right there? A. Yes, sir.

Q. Did he receive any message at all while you were out of the room? A. No, sir.

Q. Then all the messages that were received and sent from [136—41] 10 o'clock in the morning until 6 o'clock that night were received and sent while you were in the room? A. Yes, sir.

Q. In the wireless room? A. Yes, sir.

Q. What time did you have dinner?

A. About 5 o'clock dinner was served, but I did not go down to eat then.

Q. What time did you go down to eat?

A. I went down after 6 P. M.

Q. What time after 6 P. M.?

A. About 6:15, I should judge.

Q. About how long did you remain at dinner?

A. About 10 minutes.

Q. Not any longer than that? A. No, sir.

Q. So that you got back to the wireless room about 6:30 P. M.?

A. Yes, sir, I did not want to leave the other wireless operator on watch because I did not think he was competent.

Q. He had not had experience enough in your opinion?

A. He had a Government license.

Q. He was purely a theoretical man, was he?

A. Yes, sir.

Q. What was his name? A. K. G. Clark.

Q. Is he one of the libelants here in this suit?

(Testimony of B. Frankel.)

A. Yes, sir.

Q. You say he did not receive any of these messages while you were present in the Marconi Wireless room—

A. (Intg.) Outside of Exhibit No. 17 there.

Q. (Contg.) —with the exception of Exhibit No. 17? A. Yes, sir.

Q. And that was received while you were in his presence?

A. That was received while I was in the room.

Q. When did you first sight the “Roanoke”?

A. About 5:30.

Q. How far were you from her when you saw her?

A. About 500 feet. [137—42]

Q. Didn't you see her before that? A. No, sir.

Q. Were you on the lookout for her at all?

A. No, sir.

Q. Was that the first time you came out of the wireless room?

A. We were just backing around, so through the rear windows of the wireless room from there I could see the “Roanoke.”

Q. That was the first you saw of her, when you got 500 feet from her? A. Yes, sir.

Q. Did the “Roanoke” put off a boat at that time?

A. She did.

A. How many men were in the boat?

A. Three.

Q. Did they ship that boat the first time they tried it?

A. I could not say; the boat was in the water the

(Testimony of B. Frankel.)

first time I seen her.

Mr. WALL.—We object to this as not proper cross-examination, and as having nothing to do with the direct examination in chief; we have no objection if they want to make him their own witness on cross-examination.

Mr. SOOY.—Q. You did not see this life-boat, or what was it, a work boat, was it not, of the “Roanoke”?

A. I don’t know. I just seen some boat from the window.

Q. An ordinary-sized boat?

A. Yes, sir, I believe so.

Q. How many men did it take to man her?

A. Two seamen and the first officer in her.

Q. You don’t know whether they had any trouble shipping this boat, or not, do you? A. No, sir.

Q. Did these men in this boat have any small lines?

Mr. WALL.—Can we have the same objection to all this testimony?

Mr. SOOY.—Yes.

A. I believe they had a small line running aboard; at least [138—43] it was dropped from the “Roanoke” to the small boat.

Q. Do you know whether they took that and boarded the “Roanoke,” or not?

A. I believe they left the “Roanoke” and boarded the “Santa Clara.”

Q. Do you know whether they had any trouble in boarding the “Santa Clara,” or not?

A. No, sir, I do not.

(Testimony of B. Frankel.)

Q. You don't know anything about it?

A. No, sir.

Q. What was the condition of the weather there at that time? A. Very foggy.

Q. Very foggy? A. Yes, sir.

Q. Would you say it was excessive fog?

A. Yes, sir, it was.

Q. Thick blanket of fog? A. Yes, sir, it was.

Q. How far could you see in it?

A. A quarter of a block, I should judge.

Q. Not any further than that? A. No, sir.

Q. You are quite sure of that? A. Yes, sir.

Mr. WALL.—He says a quarter of a block, he should judge. Now, you confuse the witness by asking if he is quite sure.

Mr. SOOY.—I asked him if he is quite sure of that and he says he is.

Q. How far was the "Roanoke" from the coast?

A. I could not see the coast line.

Q. You do not know how far she was then?

A. No, sir, I could not see in the fog, it was too thick.

Q. On your direct examination you said two miles?

A. I don't know exactly outside of the messages that were exchanged saying it was two miles.

Q. Of your own knowledge do you know how far the "Roanoke" was from the coast? A. No, sir.

Q. You don't know? A. No, sir. [139—44]

Q. Do you know how far off the coast you can hear the fog horn? A. It was very strong.

(Testimony of B. Frankel.)

Q. Do you know how far off the coast you can hear it? A. No, sir.

Q. Don't you know as a matter of fact you can hear the fog-horn 17 miles out at sea?

A. I believe so.

Q. Don't you know in the fog you can hear it 17 miles and hear it strongly off the coast?

A. They don't blow the fog-horn unless it is foggy.

Q. I say don't you know you can hear it 17 miles off the coast? A. Further.

Q. You know the actual Government test is 17 miles? A. Yes, sir.

Q. You heard of tests being made? A. Yes, sir.

Q. You have a record of the fog-horns?

A. Not the Point Arguello.

Q. You have a record of all the fog-horns along the coast? A. Briefly.

Q. What are the records of those fog-horns along the coast? A. About 25 miles.

Mr. WALL.—I would like to put in an objection to all this character of cross-examination as unnecessarily burdening the record, and as not being applicable to the examination in chief; that the answer to the libel itself states that the "Roanoke" was not more than two miles south of Point Arguello and there can be no purpose in this examination as far as this witness is concerned except to burden the record.

Mr. SOOY.—I would like to make this statement then. The record was unnecessarily burdened in the direct examination [140—45] in that the wit-

(Testimony of B. Frankel.)

ness was asked as to the weather conditions off Point Arguello and gave it as his opinion that the vessel was two miles offshore because he could hear the fog-horn. The purpose of this examination goes particularly to the competency of the witness.

Q. Now, do you know of your own knowledge whether this place where the "Roanoke" was was an exposed place, or not? A. I believe so.

Q. Do you know of your own knowledge?

A. It was not a very good place to be.

Q. Do you know whether it was an exposed place, or not? A. Yes, sir, I do.

Q. What do you mean by an exposed place?

A. Well, we could hear the breakers, for instance, from the shore; that was very near.

Q. Can't you hear the breakers anywhere two miles from the coast?

A. No, only very near shore.

Q. You cannot? A. No, sir.

Q. Did you ever hear breakers two miles from the coast in your life? A. No, sir.

Q. You say it was an exposed place because you could hear the breakers?

A. Well, the position of the "Roanoke" was not very safe. She was right at the point there and the sea is apt to break up any minute because it was a heavy swell.

Q. How do you know she was right at the point?

A. The strength of the fog-horn, for instance.

Q. You say within two miles of the point in your direct examination. Now, if she is two miles from

(Testimony of B. Frankel.)

the point and there is no wind blowing how do you make it out she was in an [141—46] exposed place?

A. Well, the strength of the fog-horn was too strong to be safe for any navigator travelling around there in a fog. The fog-horn was too loud to be safe and the breakers from the shore, you could hear them quite well.

Q. What do you mean by an exposed place; that condition would be true any where, would it not?

A. Yes, sir.

Q. You would say if the "Roanoke" were in San Francisco Bay and if she were up close to the mud flats she would be in an exposed place, would you not? A. If you want to say so.

Q. The reason she was in an exposed place was because she was within two miles of shore and the breakers could be heard?

A. I could not say how many miles she was within shore; she might have been 50 as far as that is concerned.

Q. Do you know whether the wind was apt to blow with great violence during the month of April?

Mr. WALL.—We object to that; he said all he could about the wind blowing there. This is distinctly not proper cross-examination to prove something else by this witness or to impeach him by asking something of that nature when he stated just exactly what he knew about how the winds blew and he did not say anything of the kind in the question asked.

(Testimony of B. Frankel.)

Mr. SOOY.—Q. Answer the question.

Mr. WALL.—Read the question, Mr. Reporter, to the witness.

(The Reporter reads the question.)

A. Well, I am not a navigator in any way. I have not got to make up the deck department in charge of the weather, but from my past experience I should judge that the winds around Point Arguello are apt to blow at times a little strong like that.

Mr. SOOY.—Q. Would you say they would blow with great [142—47] violence during the month of April at any time?

Mr. WALL.—The question is contrary to my objection, and it is an attempt to force some statement from the witness.

A. Well, it all depends upon what great violence means; it might be 90 miles an hour for all that and the winds around Point Arguello do not blow at that strength. I should judge it was not in great violence for you cannot say that.

Mr. SOOY.—Q. A strong wind? A. Yes, sir.

Q. The winds there as far as you know blow with great violence around Point Arguello, do they?

A. I cannot say if you call it great violence, or not.

Q. How do you know that the coast was rocky and dangerous at all around where the "Roanoke" lay?

A. From passing that point there.

Q. You mean by an exposed beach—what do you mean by an exposed beach?

A. No coves and it is easy to run ashore.

Q. Is not the whole coast from San Francisco

(Testimony of B. Frankel.)

down outside of Monterey Bay and Port Harford, is not that an exposed coast? A. Yes, sir.

Q. Are not all coasts exposed?

A. More or less.

Q. Would not the vessel be exposed if she were out five miles at sea?

A. No, sir, you could not say that.

Q. You could not say she was exposed?

A. No, sir. If she was near the shore she is exposed.

Q. That is what you mean by the term exposed?

A. Yes, sir.

Q. Did you see the coast line at any time after you got the line aboard the "Santa Clara"?

A. No, sir.

Mr. WALL.—He has testified several times that he did not. It is only encumbering the record.

Mr. SOOY.—Q. Do you know whether the "Santa Clara" came [143—48] dangerously near colliding with the "Roanoke"?

A. I could not see as I was in the room at the time.

Q. You did not see that? A. No, sir.

Q. You have not any knowledge as to whether she came very near colliding with the "Roanoke," have you? A. No, sir.

Q. Did you hear the whistle of the "Roanoke" when you got near her? A. I could not say.

Q. Say approximately? A. It was.

Q. It was before you could see her?

A. Yes, sir.

Q. You saw her first 500 feet away?

(Testimony of B. Frankel.)

A. I heard the whistle before I saw the "Roanoke."

Q. You think you were 1,500 to 2,000 feet?

A. It might be 15 miles as far as that goes, I could not tell.

Q. How long before you saw the "Roanoke" did you hear her whistle the first time?

A. I should judge about 10 minutes.

Q. 10 minutes before? A. Yes, sir.

Q. Were you going under a full head of steam on the "Santa Clara"?

A. We were proceeding very slow.

Q. Very slowly? A. Yes, sir.

Q. Then how do you say in your libel here that you came very nearly colliding with the "Roanoke"?

A. I did not say so.

Mr. WALL.—He did not swear to the libel.

Mr. SOOY.—He did not swear to the libel.

Mr. WALL.—No.

Mr. SOOY.—Q. You do not know as a matter of fact whether you came very near colliding with her, or not?

A. I was in the wireless room, I could not say.

Mr. WALL.—He has answered that question a number of times. There would be no purpose of reiterating that except to encumber the record. [144—49]

Mr. SOOY.—Will you make your objection, Mr. Wall.

Mr. WALL.—I object to it as encumbering the record.

(Testimony of B. Frankel.)

Mr. SOOY.—Q. After the “Santa Clara” received the line which was put out by the “Roanoke’s” crew, what did the “Santa Clara” do, if anything?

A. Well, I believe she proceeded to tow the “Roanoke” up to Port Harford.

Q. Do you know whether she lay off San Luis Obispo with the “Roanoke” all night, or not?

A. No, sir, I was asleep at the time.

Q. What time did you turn in, did you say?

A. 1 A. M.

Q. In the morning? A. Yes, sir.

Q. How far had you gotten down the coast at 1 A. M.? A. I could not say.

Mr. WALL.—Do you mean how far he had gotten down the coast?

Mr. SOOY.—Q. Up the coast.

Q. You do not know? A. No, sir.

Q. Do you know whether the “Santa Clara” took the “Roanoke” into San Luis Obispo, or not?

A. I believe she did. When I arose the next morning I see the “Roanoke” outside of the harbor there so she must have taken her there.

Q. Did you render any service in or about the towage of the “Roanoke”?

A. No, sir, I was on watch.

Q. All you did was to receive and send wireless messages? A. Which was my duty, yes.

Q. That is all you did? A. Yes, sir.

Q. You did not assist in making this line fast?

A. No, sir.

(Testimony of B. Frankel.)

Mr. WALL.—We will admit all that if you want us to.

Mr. SOOY.—I want to get out what the witness did.

Q. You did not aid the crew, you did not do any work in or [145—50] about her?

A. No physical work.

Q. You turned in at 1 A. M. in the morning?

A. I did.

Q. For that service of receiving and sending these messages you ask for some salvage, do you?

A. I do.

Q. That is your position before the Court, is it?

A. Yes, sir.

Q. Weren't you paid for sending and receiving these messages?

Mr. WALL.—We object to that as not proper cross-examination; and as counsel must know as a matter of law that whether he was paid for doing his duties, or not has nothing to do with whether he is entitled to salvage services.

Mr. SOOY.—Q. Just answer my question.

A. Yes, sir, I was paid to do that the same as any member of the crew to do his duty.

Q. Just answer the question.

Mr. WALL.—He has answered.

Mr. SOOY.—Q. You have answered that you were paid? A. Not at the time, I was paid later.

Q. You were paid?

A. Not for that service, but as a wireless operator.

Q. You were paid for sending and receiving those

(Testimony of B. Frankel.)

messages, were you not?

A. During the month, yes.

Q. But the only duty you performed was to receive and send these messages which are in evidence here? A. Yes, sir and do purser work.

Mr. WALL.—We will admit all of that.

Mr. SOOY.—I understand, just make your objection.

Mr. WALL.—I say we will admit all of that.

Mr. SOOY.—Make your objection.

Mr. WALL.—I have no objection except that this is encumbering the record when I am willing to admit all the [146—51] facts.

Mr. SOOY.—Make your objection.

Mr. WALL.—I am stipulating this.

Mr. SOOY.—You and I do not seem to be able to stipulate to anything. Go ahead and make your objection.

Mr. WALL.—Whenever I am willing to state that I am willing to admit anything I am going to state it and have it go in the record.

Mr. SOOY.—That is perfectly satisfactory, anything you want.

Q. You turned in at 1 A. M.? A. Yes, sir.

Q. On the morning of the 11th? A. Yes, sir.

Q. Where was the vessel at that time?

A. I could not say.

Q. Did you go to sleep when you turned in?

A. I did.

Q. Did you sleep soundly? A. I did.

Q. Until what time? A. 8 A. M.

(Testimony of B. Frankel.)

Q. On the morning of the 11th? A. Yes, sir.

Q. You were performing this service of salvage of the "Roanoke" from 1 A. M. to 8 A. M.?

A. No, sir, I was asleep at the time.

Q. Had the "Roanoke" been salved at the time that you turned in? A. What do you mean?

Q. At the time that you went to sleep in the morning at 1 A. M. was the "Roanoke" put into a safe position? A. She was.

Q. Where? A. I believe at Port Harford.

Q. Are you sure? A. Yes, sir.

Q. You are sure?

A. I could not say I was sure, I was asleep; I could not be asleep and sure at the same time.

Q. I am asking you if at the time you went to sleep the "Roanoke" was still in tow by the "Santa Clara"? [147—52]

A. A few hours she was in tow and then she was dropped.

Q. Answer the question.

A. There is various ways of answering that.

Q. Answer the question the way I want you to and you know the way? A. No, sir, I do not.

Q. Then, I will ask you if at 1 A. M. on the morning of the 11th of April at the time you turned in and went to sleep was the "Roanoke" still in tow by the "Santa Clara"? A. That is the same thing.

Q. Was she, or was she not?

A. She was for a few hours and then she was dropped.

Q. Then at 1 A. M. she was still in tow?

(Testimony of B. Frankel.)

A. Yes, sir.

Q. That is it, exactly? A. Yes, sir.

Q. That is the time you went to sleep?

A. Yes, sir.

Q. And at that time the "Roanoke" had not been brought into a place of safety?

A. She was before 8 A. M.

Q. At 1 A. M. she was not? A. No, sir.

Q. She was not? A. No, sir.

Q. So you are one of the libelants here asleep from 1 A. M. until 8 A. M. of April 11th, and now for sleeping from 1 A. M. in the morning until 8 A. M. you ask to be paid by the North Pacific Steamship Company?

Mr. WALL.—We object to that as not proper cross-examination and it is entirely an unfair method of cross-examination and has nothing whatever to do with this case in any possible way.

Mr. SOOY.—Q. Just answer the question.

A. I do.

Q. You do? A. Yes, sir.

Q. You expect to be paid for the time while you are asleep, [148—53] do you?

A. Certainly.

Q. You think you did your full duty by the North Pacific Steamship Company in sleeping, do you?

A. I do.

Q. During that period of time? A. I do.

Q. Did you consider at any time that the "Roanoke" was in any great danger?

A. I was in need of sleep and I had to sleep.

(Testimony of B. Frankel.)

Q. Answer the question. Read the question, Mr. Reporter. (The Reporter reads the question.)

A. Yes, sir.

Q. What time?

A. I could not say, when I was asleep she was in danger.

Q. She was in danger at the time you went to sleep? A. I believe so.

Q. What makes you think so?

A. If the line parted we would have another job on our hands of getting the line aboard again.

Q. If the line did not part she was all right?

A. Yes, sir.

Q. Then the only danger was if the line had parted, and if the line did not part she was all right?

A. Yes, sir.

Q. Was there any other danger?

A. I could not say. The boilers might blow up.

Q. Don't you know, as a matter of fact, they had the boilers burned down? A. No, sir.

Q. Don't you know, as a matter of fact, the steam was down? A. No, sir.

Q. Other than the ordinary risk in towing vessels the "Roanoke" was not in any greater risk?

A. No, sir.

Q. You felt reasonably sure that the "Roanoke" was not in a great danger after the line was put out on her? A. Personally, no.

Q. You thought there was still danger?

A. I did not think [149—54] so; the others might have.

(Testimony of B. Frankel.)

Q. You did not think there was any personal danger at all? A. No, sir.

Q. That is why you turned in at 1 o'clock?

A. No, sir, sleep demanded that I turn in.

Q. Sleep demanded that you turn in?

A. Yes, sir.

Q. You were all in at the time, were you?

A. No, sir.

Q. You thought at the time there was no need of staying up any longer?

A. While the other operator was on watch I thought I could turn in.

Q. You thought there was no great danger to the vessel?

A. If there was I would have the other operator call me.

Q. Do you know if any members of the crew turned in at that time? A. No, sir.

Q. You do not know of any other one but yourself? A. That is the idea.

Q. As a libelant here you are asking quite a large sum of the North Pacific Steamship Company for that service rendered?

Mr. WALL.—Where do you find that in the libel?

Mr. SOOY.—I am asking if that is the case.

Mr. WALL.—I object to that as unfair cross-examination and a question that should not be put to any witness in view of the fact that the libel clearly says, “that this Honorable Court would be pleased to decree such a sum of money or proportion of the value of the said steamer ‘Roanoke,’ ” and so on, “to

(Testimony of B. Frankel.)

each of said libelants and others, salvors, as a compensation for their salvage services.” It does not name any amount. I object to that as unfair cross-examination.

Mr. SOOY.—I think I am fair in my questions.

Q. Then you expect from the Court in this case compensation [150—55] for what you did there as a wireless operator? A. I do.

Mr. SOOY.—That is all.

Mr. WALL.—No questions. [151—56]

United States of America,
State and Northern District of California,
City and County of San Francisco.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that pursuant to the order of reference made to take and report the testimony herein that on Tuesday, June 17th, 1913, I was attended by F. R. Wall, Esq., Proctor for the Libelant, and C. H. Sooy, Esq., Proctor for Claimant, and by the witnesses, Albert H. Ginman, Charles P. Doe and B. Frankel, who were of sound mind and lawful age, and that the said witnesses were by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause; that the foregoing testimony was taken in shorthand by Herbert Bennett, a competent stenographer, and afterwards reduced to typewriting, pursuant to such order of reference.

In witness whereof, I have hereunto subscribed my hand at my office in the City and County of San

Francisco, State of California, this 15th day of June, 1913.

FRANCIS KRULL,
U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed Sept. 15, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [152—
57]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

OSKAR JOHANSEN et als.,

Libelants,

vs.

The Steamer "ROANOKE," etc.,

Respondent.

Monday, July 14th, 1913.

TESTIMONY TAKEN ON REFERENCE BE-
FORE FRANCIS KRULL, U. S. COMMIS-
SIONER.

APPEARANCES.

F. R. WALL, Esq., for the Libelants.

C. H. SOOY, Esq., for the Respondent. [153—1]

[Testimony of F. G. Palmer, for Libelants.]

F. G. PALMER, called for the libelants, sworn.

Mr. WALL.—Q. Give your full name, Palmer.

A. F. G. Palmer.

Q. Where were you on April the 10th of this year?

A. I was on board the steamer "Santa Clara."

(Testimony of F. G. Palmer.)

Q. Where was that vessel at that time?

A. The "Santa Clara" at the time was about an hour or an hour and a half off the part of San Luis, or Port Harford.

Q. Where was she going?

A. She was bound for Port Harford.

Q. Where had she come from?

A. San Francisco.

Q. When did she leave San Francisco?

A. She left San Francisco on the 9th.

Q. What were you doing on the "Santa Clara," if anything, in the forenoon of April 10th, 1913?

A. In the forenoon I was below. I was below from 8 to 12 in the morning.

Q. Go ahead and tell what, if anything, occurred on the "Santa Clara" beginning from the morning of April the 10th, from that time on with relation to the steamer "Roanoke."

A. Anything that occurred from 8 to 12.

Q. No, from the morning of April the 10th onward. That is, tell a connected narrative of what happened so far as you know?

A. Well, it happened that we received a message from the "Roanoke" to come to assist her.

Q. And what was done on the "Santa Clara" then?

A. The course of the "Santa Clara" was shifted for Point Arguello.

Q. Did the "Santa Clara" go into San Luis Obispo, or did she go elsewhere from there?

A. She did not go into San Luis Obispo. [154—2]

Q. Where did she go?

(Testimony of F. G. Palmer.)

A. She went down to Point Arguello.

Q. How long did it take her to go to Point Arguello? A. About five hours.

Q. While she was steaming toward Point Arguello, tell fully what was the condition of the weather?

A. The weather was fair, it started to get foggy on the way down about four o'clock.

Q. About four o'clock?

A. About four o'clock or half-past three.

Q. And how was the fog?

A. Very thick, the thickest fog I have ever seen this year on this coast.

Q. After the steamer "Santa Clara" arrived off Point Arguello what did she find there?

A. She found the "Roanoke" laying there at anchor.

Q. Where was the "Roanoke" lying at an anchor?

A. About a mile or a mile and a half south of the point.

Q. South of the Point Arguello? A. Yes, sir.

Q. How do you fix the position of the "Roanoke" as being a mile or a mile and a half south of the Point Arguello? A. By the sound of the whistle.

Q. What whistle?

A. The whistle of herself and the whistle of the light-house.

Q. What condition was the "Roanoke" in?

A. She lost her propeller and she was without means to proceed on her voyage.

Q. What was the direction, if any, of the wind there at that time?

(Testimony of F. G. Palmer.)

A. The wind was northwest; northwest and westerly.

Q. How often have you been by that part of the coast during the month of April?

A. I went by there twice down and twice up.

Q. And what winds were prevailing during the time that you [155—3] went by?

A. Northwest every trip.

Q. And as to the force of the wind on those trips, the force of the wind from the northwest, what can you say as to that?

Mr. SOOY.—We object to any testimony as to the force of the winds on any other trip save and except the trip on which this salvage case is concerned with.

Mr. WALL.—Q. Read the question, Mr. Reporter.
(The Reporter reads the question.)

A. You mean as to those, the force of the wind?

Q. Any of those trips that you went by there during the month of April?

A. The trip before the salvage case happened was about No. 4—No. 5 wind; it was a little stronger than the trip the salvage case happened.

Q. And afterwards during the month of April?

A. The trip we salved her the wind was moderate.

Q. And any other trip?

A. I answered that question. It was a little stronger the trip before.

Q. What effect, if any, did it have upon the speed of the vessel you were on?

(Testimony of F. G. Palmer.)

A. It affected the vessel and kept her back about four hours.

Mr. SOOY.—The same objection to that line of testimony, Mr. Wall.

Mr. WALL.—Yes, the same objection to the whole line of that testimony.

Q. How often have you been by the coast in that locality altogether at any time during your cruising?

A. That is pretty hard to count up; you know, weekly trips.

Q. In going by state whether you went close by the coast or at a distance?

A. I went by on the steamer “Coos Bay” for three months every week twice last winter. [156—4]

Q. As to going far out or close along the coast state what the facts are?

A. We kept as close as possible in every trip.

Q. Were you or were you not able to make any examination of the coast to tell what the general condition of the coast was?

A. Yes, sir, you could see the coast clearly except in foggy weather.

Mr. SOOY.—Q. That is on the trips?

A. Yes, sir.

Mr. WALL.—Q. I am asking about the general condition of the coast on any trips, being able to inspect the coast?

A. And I went by the same points on the steamer “Governor” in the month of May, June to the 10th of July.

Q. What can you say as to the condition of the

(Testimony of F. G. Palmer.)

coast from Point Arguello, around Point Arguello and from Point Arguello south for a distance of two miles?

A. It is partly rocky; beach and hand rocks and partly rocks.

Q. I will show you the Coast and Geodetic Survey Chart of the Pacific Coast, No. 5300, from Santa Rosa Island to Point Buchon, California, directing your attention to that part of the chart in the vicinity of Point Arguello, and I will ask you to explain in detail from your observation using the chart as a diagram, the nature of the coast from Point Arguello down below to what is marked Rocky Pt?

A. Here is the Point Arguello (pointing); this is the lighthouse (pointing).

Mr. SOOY.—Putting your finger on the star marked Point Arguello F. L. W. in dark letters with the word “light” underneath and “siren” in parenthesis underneath that.

Mr. WALL.—Q. Now, how far out does the land stick out where the light-house is situated?

A. About half a mile. Oh, [157—5] the land outside?

Q. No, how far out does the land stick from the general coast? A. About half a mile.

Q. And what is the nature of the coast outside of the light-house?

A. Outside of the light-house it is about four or five rocks visible about a quarter of a mile out.

Q. As to their size?

A. Well, the general size—say about like this table

(Testimony of F. G. Palmer.)

over there (pointing) the way the rocks look from the ship about a mile and a half off.

Mr. SOOY.—Q. About six or eight feet square?

A. They are bigger than that when you come close. Sometimes they are visible and sometimes they are not. Three of them are visible always.

Mr. WALL.—Q. But about a mile off you say they look to be from six to eight feet square?

A. Yes, sir. To the south is some more rocks, right south of the light-house.

Q. And what size do those seem to be?

A. They seem to be a little bigger, about 15 or 20 feet somewhere.

Q. Go on then down the coast.

A. Then there is a little bit of rocky beach from here to here (pointing) about half a mile.

Q. Rocky beach from about here to here indicating from the light-house in a southeasterly direction across the bay to the coast? A. Yes, sir.

Mr. SOOY.—Are you going to offer this map in evidence?

Mr. WALL.—Yes.

A. (Contg.) Then there is a rocky point next with ordinary land about 60 feet high—not that much, about 40 or 50 feet high with rocks at the foot.

Q. Where?

A. At the foot of Rocky Point next to the [158—
6] beach.

Q. Put the point of the pencil where you mean?

A. Here is Rocky Point (indicating).

Q. Just a little to the right of the letter Pt?

(Testimony of F. G. Palmer.)

A. Rocky Point is right here.

Mr. WALL.—The witness putting his pencil on the period indicated by the name Rocky Point.

Q. Up above where the figure 5 is above the letters "Pt." and a little bit to the northeastward what is the condition of the coast there?

A. The same kind of beach as between Point Arguello and this point here. (Indicating).

Mr. WALL.—Putting his pencil on the coast to the northeast of the figure 5.

Q. And going just below Rocky Point what is the condition of the beach there?

A. The beach is stony.

Q. A stony beach?

A. Yes, sir, stones as big as your hand. And off the beach is little rocks right along, most of them not visible except at low water.

Q. That is the way it appeared to you at what distance off of the coast? A. What is that?

Q. I say, that is the way it appeared to you at what distance off of the coast?

A. That is the way she appeared to me about a mile and a quarter off.

Q. About a mile and a quarter off the coast?

A. Yes, sir.

Mr. WALL.—We offer the chart in evidence as Libelants' Exhibit Palmer 1.

Mr. SOOY.—I offer a formal objection on the ground that it is incompetent, irrelevant and immaterial, and ask that all of the testimony of the witness based upon that exhibit be stricken out as in-

(Testimony of F. G. Palmer.)

competent, irrelevant and immaterial. [159—7]

(The map is marked Libelants' Exhibit Palmer 1.)

Mr. WALL.—Q. State what effect, if any, the fog had upon the navigation of the "Santa Clara"?

A. We had a fog so strong that we could not see the "Santa Clara" until about 100 feet away from her.

Q. You mean you could not see the "Roanoke"?

A. We could not see the "Roanoke" until we were pretty close to her, about 100 feet away from her; 100 feet or 150 feet.

Q. State whether or not the "Roanoke" was in any danger at any time from the "Santa Clara," from the navigation of the "Santa Clara"?

A. She was in danger of being run over.

Q. State just exactly what the facts were in regard to that; just what happened?

A. We steered for the steam whistle sound of the "Roanoke."

Q. Who was at the wheel of the "Santa Clara"?

A. I was at the wheel myself.

Q. Go ahead.

A. And we had a starboard helm on her and the "Roanoke" gave us a wrong whistle, a towboat whistle, that is two long whistles and a short one. She blew that whistle twice by mistake, I think. We thought it was a tug and steered for it, and we got the "Roanoke" in sight. I had a starboard helm on her. The "Roanoke" was on the port bow of us. If we run with that helm starboard we were

(Testimony of F. G. Palmer.)

bound to run her over in about five minutes, less than that, two and a half minutes; two minutes. So when we got in sight of her, a short distance from us, and I seen her and the orders came from the bridge "hard astarboard," right away to keep clear of her and we got clear of her just in time.

Q. Well, just before you got the order hard astarboard—

A. (Intg.) I started to move my wheel just at the time the [160—8] captain gave the orders because I seen the vessel just a second ahead of him.

Q. Then the fact is you anticipated his order by the slightest—

A. (Intg.) I expected his order to come.

Q. And you started to move your helm just a little bit before you got the order? A. Yes, sir.

Q. What was done in picking up the "Roanoke"?

A. The "Roanoke" lowered a boat with two men in it and brought a heaving line on board and by the small rope we hauled on board the hawser connected out of three different parts, ropes and wire and the last part was the chain of the "Roanoke."

Q. The cable of the "Roanoke"?

A. The anchor cable, yes, sir. Next to it was wire and to the wire was $\frac{1}{2}$ inch rope.

Q. Which anchor chain was it, do you know? If you do not know say so.

A. I am not sure. I think it was the starboard.

Q. Did you see that cable from the bow of the "Roanoke"?

A. No, sir, the "Roanoke," we just took the $\frac{1}{2}$

(Testimony of F. G. Palmer.)

inch rope on board; the wire was connected next to it and the crew of the "Roanoke" was pulling out the chain part of it; not much of it.

Q. What I mean is, the chain cable from the "Roanoke" lead from the bow of the "Roanoke"?

A. From the bow of the "Roanoke."

Q. How many anchors did the "Roanoke" have down at the time? A. One anchor.

Q. Did the "Santa Clara" have any suitable hawsers on board for towing, any suitable apparatus on board for towing? A. None at all. [161—9]

Q. The "Roanoke" then was taken in tow by the "Santa Clara"? A. Yes, sir.

Q. And what did the "Santa Clara" then do?

A. The "Santa Clara" headed her for Port Harford.

Q. During the time that you were taking the "Roanoke" in tow state whether or not you saw any other vessel there?

A. I saw a gray-painted steam schooner making to the "Santa Clara" shift its course.

Q. And how long did she stay there, this gray schooner?

A. She was under way and she just shifted her course and cleared a collision.

Q. After the "Roanoke" was taken in tow what did the "Santa Clara" then do?

A. She then towed her to Port Harford during the night.

Q. And what time did she arrive off Port Harford?

A. She arrived there about—she arrived off Port

(Testimony of F. G. Palmer.)

Harford some time around 4 o'clock in the morning.

Q. State whether or not you were on watch at the time she arrived off there.

A. I just went off watch when she arrived off Port Harford.

Q. And you went off watch at 4 o'clock, did you say, in the morning of the 11th? A. Yes, sir.

Q. And when you got up in the morning did you see the "Roanoke"?

A. I seen the "Roanoke" lying to anchor in Port Harford.

Q. I will ask you to look at the libel for salvage in this case and state whether or not the persons named in the libel as libelants were members of the crew of the "Santa Clara" on April the 10th and the 11th at the time that the "Roanoke" was taken in tow by the "Santa Clara." [162—10]

Mr. SOOY.—I object to that as calling for the conclusion of the witness, and further as not the best evidence.

Mr. WALL.—He was a member of the crew himself and knows whether these people were members of the crew from his own personal knowledge.

Mr. SOOY.—Is there any dispute here as to the members of the crew?

Mr. WALL.—You deny on information and belief that certain people were members. The only one I know of that there is any question about is this fellow Havness.

Mr. SOOY.—There are four or five there that we have no record of.

(Testimony of F. G. Palmer.)

Mr. WALL.—According to Mr. Doe's testimony it was this fellow Havness and Staly, but if we can agree that these people were members of the crew—

Mr. SOOY.—There was some doubt as to those.

Mr. WALL.—I do not want you to agree as to Havness and Haly and Staly because I am not sure of them myself. They signed the power of attorney, but I have not verified the facts.

Mr. SOOY.—We can get at the facts.

Mr. WALL.—Q. Read the names and say whether or not they were members of the crew of the "Santa Clara" on the 10th and 11th of last April at the time the "Santa Clara" picked up the "Roanoke" and towed her up to Port Harford. If there are any of them that you do not know, say no. Oskar Johansen? A. He was on board.

Q. H. Meislahn? A. He was on board.

Q. P. Cain? A. He was on board.

Q. F. G. Palmer, that is yourself?

A. Yes, sir. [163—11]

Q. George K. Bekker? A. He was on board.

Q. C. Christensen? A. He was on board.

Q. A. Johnsen? A. He was on board.

Q. A. C. Andersen? A. He was on board.

Q. E. Andersson? A. He was on board.

Q. H. Andreasen? A. He was on board.

Q. A. Fraser? A. I know him.

Q. O. Havness? A. I would not swear to that man.

Q. M. Staly? A. He was on board.

Q. M. Haly? A. That is the same man.

(Testimony of F. G. Palmer.)

Q. That is the same man as M. Staly?

A. Yes, sir.

Q. W. Kremer? A. Yes, sir.

Q. V. Matson? A. He was on board.

Q. J. Kotcharin? A. Yes, sir.

Q. C. Gibson? A. He was on board.

Q. A. Sjogren? A. He was on board.

Q. B. Frankel? A. Yes, sir.

Q. K. G. Clark? A. He was on board.

Q. A. S. Caskey? A. He was on board.

Q. S. B. Nilsen? A. He was on board.

Q. George M. Reed? A. He was on board.

Q. G. W. Jacobs? A. Yes, sir.

Q. A. Disher? A. He was on board.

Q. J. E. Johnson? A. Yes, sir.

Q. W. E. Pitts? A. He was on board.

Q. G. Drew? A. Yes, sir.

Q. A. G. Clarke? A. Yes, sir.

Q. J. Martin? A. Yes, sir.

Q. E. Andrews? A. Yes, sir.

Q. J. Pitts? A. Yes, sir. [164—12]

Q. And R. Tennant? A. Yes, sir.

Mr. WALL.—That is all.

Cross-examination.

Mr. SOOY.—Q. Where was the “Santa Clara” on the coast of California when she received the message from Mr. Doe to go to the “Roanoke”?

A. She was about a short while off from Port Harford.

Q. And how far is Port Harford from Point Arguello? A. It is about 40 miles.

(Testimony of F. G. Palmer.)

Q. What time did you receive your message from Mr. Doe?

Mr. WALL.—If the witness knows.

Mr. SOOY.—Q. If you know?

A. Well, about 11 or half past 10 in the morning.

Q. About 11 or half-past 10 in the morning?

A. Yes, sir.

Q. Of April the 10th?

A. Yes, sir, April 10th.

Q. And how long did it take the “Santa Clara” to go from Port Harford—off Port Harford to Point Arguello where the “Roanoke” was?

A. About 6 hours.

Q. About 6 hours? A. Yes, sir.

Q. Did you run under a full head of steam?

A. We run under the full head of steam; not all the time, we slowed down sometimes on account of the fog.

Q. Yes, but how much of the time were you slowed down?

A. We did not slow down until we hear her steam whistle.

Q. The steam whistle of the “Roanoke” do you mean? A. Yes, sir.

Q. And how far were you from the “Roanoke” when you first heard her whistle?

A. Well, she has got a strong whistle.

Q. Approximate it, Mr. Palmer?

A. About 7 or 8 miles. [165—13]

Q. So that from Port Harford to the time when you were within 7 or 8 miles of the “Roanoke” you

(Testimony of F. G. Palmer.)

did not slow down at all, did you; you ran right along? A. We ran right along.

Q. Usual course of speed? A. Yes, sir.

Q. You were at the wheel, were you, from half-past 10?

A. I was at the wheel from 10 to 12.

Q. From 10 to 12?

A. No, sir, I was below.

Q. Were you on duty at all?

A. I was on duty in the afternoon.

Q. At what time?

A. From two to four and from five to six.

Q. You were on duty from two to four and from five to six? A. Yes, sir.

Q. So that you were at the wheel when you heard the whistle of the "Roanoke"? A. Yes, sir.

Q. How far were you from the "Roanoke" when you first saw her?

A. Only somewheres about 150 or 200 feet.

Q. And you could not see her before that time?

A. We could not see her.

Q. What speed were you under at the time you saw her? A. Six to 7 miles.

Q. Six to seven miles? A. Yes, sir.

Q. And, then, as I understand, your testimony, as soon as you saw her you threw your wheel hard over to starboard?

A. I threw my wheel hard over to port.

Q. And what did you expect to do by throwing your wheel over to port? What way did you expect to go, on which side of the "Roanoke"?

(Testimony of F. G. Palmer.)

A. Can I explain?

Q. Yes.

A. I had the wheel starboard, and if we put the wheel to port we call it starboard; that is the style [166—14] of seamen. I moved my wheel starboard, the ship had to turn to port then. The ship went to port when the "Roanoke" came in sight on the port bow about three points—three or four points on the port bow. This "Santa Clara" was swinging to port at the same time, so I seen the ship and I heard the captain say, here is the "Roanoke"; at the same time I expected him to give me the order to port, to make the ship swing starboard, and I give her port about a second ahead before the captain gave me the orders.

Q. You were going down the coast, were you not, on the "Santa Clara"? A. Yes, sir.

Q. So that when you threw your wheel hard to port, or hard to starboard—

A. (Intg.) Hard to port.

Q. (Contg.) When you threw it hard to port you expected to keep on the ocean side of the "Roanoke"?

A. To keep out to sea of the "Roanoke."

Q. How far were you from the coast line at the time you saw the "Roanoke"?

A. Well, it was not—we was not any farther than the "Roanoke."

Q. How far is that?

A. A mile and a half, or a mile and three-quarters in my judgment.

(Testimony of F. G. Palmer.)

Q. Were you in the regular path of vessels that ply between San Francisco, Los Angeles and San Pedro? A. I have been on that run.

Q. I am speaking now on this particular day. Were you right in the pathway of the vessels that come up and go down?

A. We were inside of the course of the vessels.

Q. You were inside of the course of the vessels?

A. Yes, sir, about $\frac{1}{2}$ or three-quarters of a mile inside.

Q. Inside the course of the vessels that ply between San [167—15] Francisco and San Diego?

A. Yes, sir.

Q. You then must have put your helm to starboard before you saw the "Roanoke," after you heard her whistles.

A. I had starboard orders before to head up for the whistle.

Q. You had starboard orders to head up for the whistle? A. Yes, sir.

Q. So that by putting your helm to starboard after you received these orders to head up for the vessel you had run a half or three-quarters of a mile closer to the coast than you would have gone if you had proceeded right on your way?

A. That did not make much difference, because the orders of starboard came a few minutes before the order of port.

Q. It did not make much difference?

A. No, sir.

Q. I understand the "Santa Clara" was one-half

(Testimony of F. G. Palmer.)

or three-quarters of a mile nearer the coast than she would have been if she had not run to pick up this vessel? A. Yes, sir.

Q. Was there any wind that day, Mr. Palmer?

A. There was a northwest, a westerly wind.

Q. And what was the velocity of the wind, do you know? A. Coming wind, ordinary wind.

Q. Just an ordinary wind? A. Yes, sir.

Q. Was the sea choppy?

A. The sea was just ordinary; a little choppy.

Q. Was there any ground swell running?

A. There is always a ground swell running.

Q. There is always a ground swell on the coast between San Francisco and San Pedro?

A. Yes, sir.

Q. All up and down the coast?

A. Yes, sir, almost; more or less.

Q. Sometimes those ground swells are very violent, are they [168—16] not?

A. They are very heavy.

Q. At ordinary times just the ordinary condition of the sea known to seamen as ground swells?

A. It depends on the wind.

Q. This day was not—there was not on this day any strong movement of the water, was there?

A. No, sir.

Q. Just the same as ordinary weather?

A. Yes, sir, except the fog.

Q. So that the only unnatural, or I would say the only abnormal condition of the weather at that time was the fog. That is true?

(Testimony of F. G. Palmer.)

A. The fog and the distance offshore.

Q. I understand. I am speaking about the weather now? A. Yes, sir, the fog.

Q. That is the only thing that bothered you at all, is it not?

A. That is the thing that bothered us.

Q. If it had not been for the fog why you could have gone right to this vessel easy, could not?

A. Yes, sir.

Q. So that the fog was the only condition of the weather that bothered you at all, was it not, at that time?

A. The fog and the undertow bothered us a little.

Q. I understand. I am speaking about the condition of the weather now?

A. You count undertow to the weather?

Q. No, I am just speaking about the weather; the only condition of the weather that bothered you at all in picking up the "Roanoke" was the fog. That is true? A. Yes, sir.

Q. Was that an exceptional thick fog, Mr. Palmer?

A. It was an exceptional thick fog.

Q. Was it any thicker on that day than at other times when you passed there? [169—17]

A. It was the thickest I had that spring.

Q. Did you ever see it as thick as that before?

A. Yes, sir, oh yes.

Q. Was there any excitement on board the "Santa Clara"? A. How do you mean?

Q. Was there any excitement among the officers

(Testimony of F. G. Palmer.)

or the crew of the "Santa Clara"?

A. Not particularly.

Q. There was no excitement? A. No, sir.

Q. There was not any quick or hurried orders given? A. Except the helm orders.

Q. That is the only thing? A. Yes, sir.

Q. Did the captain tell the crew to stand by and lower away boats?

A. To stand by and take the hawser of the "Roanoke."

Q. That was the only order given other than the order to port the helm?

A. That is the only order, to stand by and take the hawser.

Q. Did the members of the crew of the "Santa Clara" expect to stand by and take up this line from the "Roanoke"? A. That is all they did.

Q. That is all they did? A. Yes, sir.

Q. The line from the "Roanoke," as I understand it was delivered—there was a hand line, is that what you call it? A. Heaving line.

Q. A heaving line was given—first a working boat was lowered from the "Roanoke"?

A. Yes, sir.

Q. And in this working boat were two men?

A. Two men and one officer.

Q. And one officer? A. Yes, sir.

Q. Who was that, the mate?

A. I think it was the second mate; I am not sure.

[170—18]

Q. And they were given a heaving line, and they

(Testimony of F. G. Palmer.)

took this heaving line to the side of the "Santa Clara"? A. To the stern of the "Santa Clara."

Q. To the stern? A. Yes, sir.

Q. On which side? A. On the port side.

Q. And then the crew of the "Santa Clara" took this hand line, did they? A. Yes, sir.

Q. And then with this hand or heaving line they drew in the main hawser?

A. They pulled in the main hawser.

Q. They pulled in the main hawser?

A. Yes, sir.

Q. And then they made that hawser fast to the bitts? A. To the bitt.

Q. On her stern? A. Yes, sir.

Q. And they took a turn around these bitts, did they?

A. Yes, sir, one bitt—two bitts. They made the main hawser fast to the port bitt and put the lashing through from the starboard bitt to the chock.

Q. About how much line did you have bent on to the "Roanoke"?

A. We had 40 fathoms of 12-inch.

Q. 48 fathoms of 12-inch? A. About 40.

Q. That would be how much; how many feet?

A. 40 fathoms; that would be 40 times 6, 240 feet.

Q. And then the "Santa Clara" proceeded to tow the "Roanoke," did she? A. Yes, sir.

Q. Now, which anchor did the "Roanoke" have down when you saw her?

A. The starboard anchor, I think.

Q. Just one anchor? A. Just one anchor.

(Testimony of F. G. Palmer.)

Q. Do you know how many feet of water there were under the "Roanoke" at that time?

A. About 60 feet—it was more than that, about 60 to 100 feet. [171—19]

Q. As a matter of fact, it might be a little deeper than 100 feet? A. Yes, sir, it might be.

Q. Were there any soundings taken there at that time?

A. No soundings taken, not on board the "Santa Clara."

Q. You do not know whether they took any on board the "Roanoke," do you? A. No, sir.

Q. How far was the "Roanoke" from the first land; that is, I mean, how far was she from the line of the beach? A. To the nearest land?

Q. Yes, the nearest land?

A. She was about three-quarters of a mile to a mile of the rocks.

Q. Three-quarters of a mile to a mile from the rocks? A. Yes, sir.

Q. And how much water was there, if you know, one-half a mile inshore from the "Roanoke"?

A. There is supposed to be five fathoms.

Q. That would be 30 feet?

A. Oh, half a mile inside it would not be more than three to five fathoms.

Q. That would be 18 to 30 feet of water?

A. Yes, sir, six feet to a fathom.

Q. How much closer could the "Roanoke" have gone to the shore before her bottom would strike the bottom of the sea?

(Testimony of F. G. Palmer.)

A. She could not go much more than about one-half a mile to the northward.

Q. How much could she have gone to the eastward? A. About the same amount.

Q. About half a mile? A. Yes, sir.

Q. Do you know how heavy the anchor of the "Roanoke" is, her stern anchor?

A. No, sir, that I do not.

Q. How long did it take the "Roanoke" to weigh her anchor [172—20] after you had the line bent on to her? A. About 15 minutes.

Q. So that after she had weighed her anchor then you proceeded to tow her, the "Santa Clara" did?

A. After she had weighed her anchor the "Santa Clara" proceeded to tow her.

Q. And how long were you from the time she weighed her anchor until you arrived at Port Harford?

A. She arrived sometime between 4 and 8 in the morning.

Q. Between four and eight in the morning?

A. Yes, sir, on my watch below.

Q. And you had the line bent on her at what time?

A. Quarter to six, or half-past five.

Q. In the afternoon? A. Yes, sir.

Q. And at a quarter to four the next morning she was close to Port Harford?

A. Not inside, outside Port Harford cruising back and forth waiting for daylight.

Q. Now, Mr. Palmer, when did you go off duty

(Testimony of F. G. Palmer.)

again, at six o'clock in the afternoon?

A. I went off duty from six to 12.

Q. And when did you go on again?

A. From 12 to 4.

Q. From six o'clock to 12 o'clock what did you do?

A. I had my watch below, slept.

Q. You went to sleep, did you? A. Yes, sir.

Q. Did you sleep comfortably? There was not anything to disturb your slumber, was there?

A. They did not wake me up.

Q. I say you sleep peacefully, the same as you do on the ordinary run?

A. Except the fog whistle kept me awake. They had to blow the fog whistle every minute.

Q. Every minute they blew the fog whistle?

A. Yes, sir.

Q. They do that on the ordinary run?

A. We had to shift [173—21] the whistle. We blew a tug whistle, just like a towboat.

Q. Other than that there was nothing to disturb your slumber, was there?

A. Nothing besides the whistle.

Q. You did not wake up at all, did you, after you went asleep?

A. Oh, sure, I woke up from the fog whistle once in a while.

Q. But you slept peacefully, did you?

A. Yes, sir.

Q. Did the "Santa Clara" put into Port Harford with the "Roanoke"?

A. Yes, sir, she put in in the morning between

(Testimony of F. G. Palmer.)

four and eight. I was below again.

Q. Just as soon as daylight? A. Yes, sir.

Q. Did you turn in at four o'clock?

A. I turned in at four o'clock.

Q. Did you go to sleep again? A. Yes, sir.

Q. And you slept how long?

A. To a quarter past seven.

Q. Until a quarter past seven in the morning?

A. Yes, sir.

Q. And what time did the "Santa Clara" put into Port Harford? A. About that time.

Q. A quarter past seven? A. About seven.

Q. About seven o'clock? A. Yes, sir.

Q. It did not get light enough to put in before that? A. No, sir.

Q. Did these men that got into this working boat from the "Roanoke" have any difficulty in getting from the "Roanoke" over to the "Santa Clara"?

A. They had no difficulty in getting over, but they had difficulty in getting on again; that is the worse, hoisting the boat up.

Q. But they had no difficulty in getting over to your vessel? A. No, sir.

Q. At no time was there any danger of the working boat being swamped, was there, or anything of that kind? A. No, sir, [174—22] there was no danger of being swamped.

Q. In other words, that boat could live there in those waters all right, could it, without any difficulty? A. It could in that sea.

Q. If you had been in that row-boat you would

(Testimony of F. G. Palmer.)

not have felt you were in any danger, would you, Mr. Palmer? A. No, sir, I would not.

Q. Now, Mr. Palmer, would you say that the "Roanoke" was in greater danger at that particular place on that particular day than she would have been in if she were in San Francisco Bay, if there was just as heavy a fog in San Francisco Bay as there was in that particular place on that day?

A. Oh, yes.

Q. You say she was in greater danger?

A. Yes, sir.

Q. Why do you say that?

A. Because if it should have started to blow her anchor would not have been no good.

Q. I am assuming now there was no wind, which you have testified to, merely an ordinary wind; assume that ordinary wind was in San Francisco Bay and the same fog, would you say the "Roanoke" was in greater danger in the bay, or in greater danger down there?

A. Down there. The wind might spring up.

Q. I am not speaking about whether the wind might spring up?

A. On account of passing vessels.

Q. Would you not have passing vessels in the bay here?

A. But the ship in the bay would not be laying in a place she had no business.

Q. I am speaking—I am assuming the vessel was lying in the bay, in the stream, and there was a thick fog and the same amount of wind you had on that

(Testimony of F. G. Palmer.)

day, where would you say there [175—23] would be the greatest danger?

A. On Point Arguello, on account of the vessels passing by getting off their course.

Q. Not as many vessels would be passing by there as in the bay?

A. There was a good position for them here.

Q. Are you a regular officer? A. No, sir.

Q. Would not there be more vessels coming by here than off Point Arguello?

A. They would not be able to get off their course here.

Q. I am assuming now that the "Roanoke" would be anchored in the stream in the bay here in a heavy thick fog, in the heaviest kind of thick fog and with the same amount of wind you had down there on that day, would you not say the "Roanoke" would be more liable to be hit in San Francisco Bay than she would down there? A. No, sir.

Q. Why?

A. Because there is a better anchor place here; they are supposed to be in anchor place.

Q. I understand. Suppose she was not anchored in that place, supposed the anchor was not—

A. (Intg.) You mean in case of accident?

Q. Yes.

A. She would be in just as much danger.

Q. Would you not say in more danger?

A. In Frisco Bay?

Q. Yes?

(Testimony of F. G. Palmer.)

A. No, sir, I would keep her whistling as well as down there.

Q. Suppose a vessel in thick fog lost her tail shaft off Goat Island and had to drop anchor right there, would you not say she would be in great danger?

A. Yes, sir.

Q. You say she would be in great danger?

A. Yes, sir.

Q. There are a great many more vessels passing her in San Francisco Bay than would pass her at Point Arguello? [176—24]

A. Yes, sir, there are more vessels, small kind, too.

Q. She would be in greater danger so far as passing vessels are concerned in the bay than she would be at Point Arguello? A. Yes, sir.

Q. Now, then, the reason you say the "Roanoke" was in great danger is because a wind was liable to spring up? A. Yes, sir.

Q. And because she would be liable to be struck by passing vessels? A. Yes, sir.

Q. Those are the only two reasons?

A. Yes, sir, and the tide.

Q. The wind and passing vessels are the only things that made that vessel be in a dangerous position, otherwise if the wind did not spring up the anchor would hold?

A. I don't know if she had good anchor ground there.

Q. But the anchor had held her?

A. It might of for a while.

Q. Well, the anchor had for several hours.

(Testimony of F. G. Palmer.)

A. Yes, sir.

Q. She had not dragged her anchor at all?

Mr. WALL.—How does he know?

A. I do not know.

Mr. SOOY.—Q. She had only one anchor?

A. Yes, sir.

Q. You are familiar with the whole coast line, Mr. Palmer, from San Francisco to San Pedro, are you not? A. To San Diego.

Q. Now, I will show you Libelants' Palmer Exhibit 1—by the way, Mr. Palmer, you have testified that the beach there at Point Arguello is rocky?

A. Yes, sir.

Q. You have testified that there are three rocks off Point [177—25] Arguello that are always to be seen by passing vessels? A. Yes, sir.

Q. Did you see them on this occasion?

A. No, sir.

Q. Not on this occasion? A. No, sir.

Q. But on other occasions you have seen them, have you? A. Yes, sir.

Q. What is the difference between the coast line at Point Arguello and other places along the coast there for four or five or six miles each way?

A. Four or five or six miles away is more sandy beach.

Q. Up towards Surf is very sandy, is it not?

A. To the southern part of Rocky Point?

Q. From Point Arguello north to Surf it gets more sandy, does it not, the closer you get to Surf?

A. Not on the point.

(Testimony of F. G. Palmer.)

Q. But the closer you get to Surf in a northerly direction it gets more sandy?

A. I do not know Surf.

Q. Now, Surf on this map is sandy.

A. I do not know Surf at all.

Q. Just look at the map here. Do you remember where the "Santa Rosa" went ashore some years ago?

A. Yes, sir.

Q. That is at Surf?

A. Yes, sir, that is Santa Ynez. I do not know that place; we go by rocks and points. The ships do not come close to Santa Ynez, they have no business there.

Q. But the further north you go it gets sandy, does it not, this beach line is sandy?

A. It is rocks and sand.

Q. As a matter of fact, is it not all sand in there?

A. I do not know how this beach runs, we are too far off.

Q. But you do know at Point Arguello it is a rocky bluff beach [178—26] there.

A. It is a rocky beach and rocks out in the water.

Q. Would you say that Point Arguello is as dangerous as Point Conception?

A. It is more dangerous. It is pointing out more.

Q. It runs further out in the water?

A. Yes, sir.

Q. Point Arguello is more dangerous than Point Conception? A. Yes, sir.

Q. Is Point Arguello more dangerous than Point Purisima? A. Yes, sir.

(Testimony of F. G. Palmer.)

Q. If a vessel is broken down a mile and a half from Purisima, or a mile and a half from Point Arguello, what is the more dangerous place?

A. Point Arguello.

Q. Why? A. It is more steeper and rocks.

Q. Would you say that Point Purisima is more dangerous than Point Sal?

A. No, Point Sal is more dangerous.

Q. Why?

A. Because the ship has its regular course and never steers in this point at all.

Q. That is Point Purisima?

A. The ships never go to Point Purisima; they go from Point Arguello to Port San Luis. The smaller ones do, but the bigger vessels steer right up to Port San Luis.

Q. Is Port San Luis a dangerous point?

A. Yes, sir.

Q. Is Point San Luis more dangerous than Point Arguello? A. If the vessels have to go in.

Q. If the vessel does not have to go in?

A. She would keep further off.

Q. Suppose she does keep far off, take vessels like the "Roanoke" or the "Santa Clara"?

A. They are close sailing vessels. [179—27]

Q. They hug the shore in their regular pathway?

A. Yes, sir.

Q. And for vessels in their regular pathway which is the most dangerous point on the coast of California. A. The point sticking out more.

Q. I say, if they keep off that point the regular

(Testimony of F. G. Palmer.)

distance where is the most dangerous place on this coast from San Francisco to San Pedro, the most dangerous place on the whole coast line. As a seaman I want you to tell me.

A. I think Point Arguello is one of the most dangerous points.

Q. Which is the most dangerous?

Mr. WALL.—He said Point Arguello is one of the most dangerous places.

Mr. SOOY.—Q. I want to get his idea of the most dangerous place on this coast?

Mr. WALL.—From San Francisco to San Pedro?

Mr. SOOY.—Q. Yes.

A. Point Conception is a bad point.

Q. That is the worse?

Mr. WALL.—He says it is a bad point.

A. The ships have to look out for it; in fact, they have to look out all the time.

Q. As a matter of fact, you have to look out for all of them up and down. A. Yes, sir.

Q. One place is as bad as another if you once get on shore?

A. No, sir, some places are better, better beaches.

Q. At Surf, as a matter of fact, there is nothing there but sand? A. Point Surf?

Q. Yes. A. I never seen it.

Q. You know where the "Santa Rosa" went ashore? A. Yes, sir.

Q. There is nothing but sand there?

A. I don't remember what [180—28] is there.

Q. There is nothing but sand at Surf.

(Testimony of F. G. Palmer.)

Mr. WALL.—He says he never saw it.

A. No ships go in there.

Mr. SOOY.—Q. Would you say that if the “Roanoke” had gone ashore at Point Arguello that you would have a better opportunity to save the vessel than you would have if she went ashore at Surf?

A. No, sir, I would say she has more chance at Surf than she has at Point Arguello.

Q. Would you say you had a better chance of saving the “Roanoke” if she went ashore right off the Cliff House here, that is, below the Cliff House—say between the Cliff House and 16 mile rock on that sandy beach there, would you say that you had a better chance of saving the vessel if she went on shore at Point Arguello than at the Cliff House?

A. Yes, sir, she had assistance close.

Mr. WALL.—Q. At which place is assistance near? A. At this point, Cliff House.

Mr. SOOY.—Q. Assuming that the “Roanoke” went ashore just below the Cliff House on that sandy beach could you get her off easier there than you could off Point Arguello?

A. It depends if she went on the sandy beach or went on the rocks.

Q. I say suppose she went on that sandy beach there, just say a mile below the Cliff House she went on that sandy beach, would you say that would have been a better chance of recovering the vessel there than if she went down off Point Arguello?

A. Yes, sir.

Q. Why?

(Testimony of F. G. Palmer.)

A. Because the vessel lays on the sandy beach. It depends how long she lays on that sand, if she lays too [181—29] long they are unable to tow her off and she will sink as there is a lot of quicksand. Here alongside of 20 minutes you could get towboats, wrecking boats and everything. To save a vessel at Point Arguello they will have to send a wrecking ship out from Frisco and that will take a day, and if it is blowing it will take more than a day. In that time she could sink in the sand.

Q. Leaving out the question of assistance, if you owned the "Roanoke" would you rather have her go ashore on Point Arguello or would you rather have her go ashore a mile below the Cliff House?

A. I would not have her going ashore at all.

Q. If you had one of the two places to have that vessel go ashore where would you rather have her go ashore, leaving out the question of assistance; which would be the hardest place to get her off?

A. I told you Point Arguello.

Q. Point Arguello is the hardest place to take her off? A. Yes, sir.

Q. Then your testimony is that Point Arguello is the most dangerous point on the coast?

A. It is the most dangerous point on the coast. It is dangerous as many other points.

Q. Is it any more dangerous than a dozen other places on this coast?

A. It is as dangerous as some points.

Q. Aren't there several other points that are just as dangerous as Point Arguello? A. Yes, sir.

(Testimony of F. G. Palmer.)

Q. So that Point Arguello is not any more dangerous than several other points on the coast, is it, Mr. Palmer? A. It is just as dangerous.

Q. Just about? A. Yes, sir.

Q. And no worse than any of the others if you keep off that [182—30] point?

A. It is not dangerous at all if a ship keeps off.

Q. If you keep off three-quarters of a mile off of that point you are in no danger, are you?

A. Three-quarters of a mile is dangerous.

Q. How far off that point must you keep?

A. There is close going vessels that keep off a mile and a quarter and a mile and a half.

Q. But if you get inside of that distance then you think it is dangerous, do you? A. Yes, sir.

Q. As a matter of fact, can't you run within one-quarter of a mile of that point? A. I have.

Q. You have been within one-quarter of a mile of that point?

A. Yes, sir, if you get it in sight, if you can see it.

Q. I see; if you can see the point you can run within one-quarter of a mile of the point, can't you?

A. Off the point.

Q. Off the point, yes.

A. Not a quarter of a mile.

Q. You can run within one-quarter of a mile of Point Arguello and not be in any danger if you can see the point?

A. No, sir, there is rocks within one-quarter of a mile.

Q. You can run within one-quarter of a mile?

(Testimony of F. G. Palmer.)

A. It all depends on the draft of the vessel.

Q. Can't you run within one-quarter of a mile?

A. Outside of the rocks.

Q. If you can see the point? A. Yes, sir.

Q. But in thick fog—in foggy weather it is not safe to run within a mile and a quarter?

A. No, sir, it is not.

Q. Because you cannot see the point?

A. Yes, sir.

Q. Now, at the time that you were on the "Santa Clara" you knew that both the "Santa Clara" and the "Roanoke" belonged to the North Pacific Steamship Company, Mr. Doe's company, [183—31] did you not? A. Yes, sir.

Q. And you felt that it was your duty to go to the assistance of the "Roanoke," did you not?

A. I felt it was my duty?

Q. Yes.

A. Well, if the captain steers the ship there we all have to go.

Q. I understand. But you felt it was your duty, did you not, to go?

A. It is always the duty of a man to help another.

Q. It is customary among shipping men, ship owners for one vessel to help the other rather than to have a tugboat? A. Yes, sir.

Q. In other words, if one company owns two vessels that are plying between Gray's Harbor and San Francisco, for instance, or any other place along the coast and one of those vessels is in distress through any cause of any kind, rather than get a tugboat

(Testimony of F. G. Palmer.)

the company sends the other vessel to the assistance of the one in distress, does it not?

Mr. WALL.—I will object to that question, as the law covers all such cases and provides specifically that in case of salvage that there is no way that the seaman can be deprived of his right of salvage, and that it is useless to attempt to prove a custom contrary to the law.

Mr. SOOY.—Q. Read the question, Mr. Reporter.
(The Reporter reads the question.)

Q. That is the custom along the coast, is it not, Mr. Palmer, for a company to send one of its own vessels to assist the vessel in distress?

Mr. WALL.—Q. If he knows.

A. It is; if there is danger they take help from any vessel coming and they have to pay salvage.

Mr. SOOY.—Q. The company always sends one of its own [184—32] vessels to the assistance of the other vessel?

Mr. WALL.—The same objection.

Mr. SOOY.—Yes.

A. Yes, sir.

Q. The company owning several vessels always sends one of its own vessels to assist the vessel in distress rather than get a tugboat? A. Yes, sir.

Q. Why is it done, if you know?

A. I can tell you right here. If a tugboat of another company salvages that vessel they would have to pay at least half of the worth of that vessel to the tugboat, and they would rather pay a little salvage to the crew of their own vessels than pay 50 per cent

(Testimony of F. G. Palmer.)

of the worth of the ship to the other company. I do not know the percentage, but I guess Mr. Wall knows that.

Q. That is the reason why it is?

A. Sure, to save money; that is the only reason.

Q. At the time that you performed this rescue, or salvage upon the "Roanoke" as you call it, the alleged salvage, you expected to have a salvage case against the "Roanoke," did you? A. Yes, sir.

Q. You expected that at that time?

A. Yes, sir.

Q. Did you talk it over among the crew prior to the time that you had the line bent on the "Roanoke"?

A. We certainly did talk it over and agree.

Q. Before you had the line bent on did you talk it over?

A. We talked it over on the boat; we all said, well there is a little money in it for us right here because the law gives it to us.

Q. Before you bent the line on the "Roanoke" did you have any talk about what you were going to claim against the "Roanoke"? [185—33]

A. Well, the crew says it is a little easy money for us right here.

Q. You said that is a little easy money for you?

A. Yes, sir.

Q. Did any of the members of the crew on towing this "Roanoke" perform any duties that they did not perform on any other trip and on the towage?

A. Yes, sir.

(Testimony of F. G. Palmer.)

Q. What other duties did they perform?

A. Taking that line on board and lashing it. The watchman, for instance, had to watch that line all night so if it carries away to keep any of the passengers from getting hurt. If that line carries away and anybody happens to be there it would not kill him but take a leg off him.

Q. What other duties did they do besides the watchman who was attending to this line, and taking turns around the bitt and putting it in the chocks or the mast of the "Santa Clara." Did they do anything else? A. They were all there.

Q. Did they do anything else?

A. That is all they had to do.

Q. Did the crew turn in and take this rest the same as you did? A. Yes, sir, they turned in.

Q. You were not up at night or called from your warm beds in the night, were you?

A. Except the lookout at the wheel.

Q. None of the crew had to get out of their beds at all? A. No, sir.

Q. There is always a watchman on board?

A. Yes, sir.

Q. So that he did not have to do anything else but keep his eye on the line? A. Yes, sir.

Q. He had to keep his eye on the rest of the vessel, did he not? A. Yes, sir.

Q. So that he did not have anything else to look out for [186—34] but this line once in a while. That is the only extraordinary duty he had?

A. He had another thing to do; he had to go into

(Testimony of F. G. Palmer.)

the foremast rigging and put up another light to show we had a vessel in tow.

Q. He had to rig up a towing light?

A. Yes, sir, that is what we call it.

Q. To show that you had another vessel in tow?

A. Yes, sir.

Q. Did you have any difficulty in towing the "Roanoke"?

A. We did not have no difficulty in towing her except we could not make the speed we would make without towing her; it was a little bit harder for her.

Q. How far off Port Harford did you go backwards and forward there waiting to go into the port?

A. Four or five miles.

Q. You did not get closer to Port Harford than four or five miles, did you?

A. Not before we were ready to go in.

Q. Could you see the shore from where you were?

A. No, sir, it was foggy.

Q. And how close to the shore were you when you first saw the shore?

A. I was not on deck when they saw the shore first.

Q. You are one of the Libelants here, one of the men that libeled the "Roanoke"? A. Yes, sir.

Q. Are you employed by the North Pacific Steamship Company now, Mr. Palmer? A. Not now.

Q. When did you quit the "Santa Clara"?

A. I quit at the same time.

Q. At the same time you libeled her?

A. Yes, sir.

(Testimony of F. G. Palmer.)

Q. Why did you not go on working in her?

A. Well, I did not like the kind of work. [187—

35]

Q. You did not like the kind of work?

A. Too hard work.

Q. What is hard about it?

A. Bad grub and bad forecastle, and I had a chance for a better vessel.

Q. What vessel do you go on now?

A. The "Governor." I left her to-day, though; I am not on her any more.

Q. You are not on her? A. No, sir.

Q. Have you any enmity towards Mr. Doe?

A. No, sir.

Q. Do you like him?

A. I do not, no; I have nothing to like him for and I have nothing to hate him for except I think he is a little cheap.

Q. You would like to see him be made to pay heavily?

A. He ought to be made pay those moneys out.

Q. You think he is a little cheap and he ought to be made to pay?

A. Certainly, he ought to settle with us without all this suit. He ought to say, here, boys, it is coming to you, and give it to us.

Redirect Examination.

Mr. WALL.—Q. In running up and down the coast south of San Francisco, vessels of the character of the "Santa Clara" navigate along the coast from

(Testimony of F. G. Palmer.)

one light-house point to the next light-house point, do they not?

A. Not always; generally bigger vessels jump to the next point sticking out.

Q. Vessels of the character of the "Roanoke" and the "Santa Clara" coming out of Santa Barbara Channel would run how close to Point Conception light under fair weather? A. About a mile.

Q. And from there they shape their course to pass how far from Point Arguello?

A. A mile and a quarter to a mile and a half.

Q. From Point Arguello vessels of that character, of the [188—36] character of the "Santa Clara" and the "Roanoke" bound for San Francisco shape their course for what point, the next point?

A. You mean not calling in any port?

Q. Not calling in any port bound for San Francisco? A. Small vessels head for—

Q. (Intg.) I am talking of vessels of the character of the "Santa Clara" and the "Roanoke"?

A. Point Buchon.

Q. If they were bound for San Luis Obispo what would be the next point they would shape their course for after Point Arguello? A. Point Sal.

Q. So then, in going from Point Arguello to Point San Luis Obispo you leave Surf well off to your right-hand side? A. Yes, sir.

Q. You cannot see the character of the beach at Surf? A. No, sir.

Q. Now, vessels anchoring in San Francisco Harbor have a certain anchorage ground, have they not?

(Testimony of F. G. Palmer.)

A. Yes, sir.

Q. And they are not allowed to anchor outside of that ground? A. No, sir.

Q. Do you know the character of the bottom of the ground of vessels anchoring in San Francisco Bay?

A. It is muddy ground.

Q. Is it considered good holding ground?

A. Very good holding ground; blue clay.

Q. Now, you did not take any soundings where the "Roanoke" was? A. No, sir.

Q. You did not see anybody else take any soundings? A. No, sir.

Q. So of your own knowledge you don't know how much water the "Roanoke" was anchored in?

A. No, sir. [189—37]

Q. When you say from 60 feet to 100 feet it was just a guess on your part? A. Yes, sir.

Q. Did you see the coast, or any part of the coast line at any time while you were handling the "Roanoke"? A. No, sir.

Q. Then your estimate of the distance that the "Roanoke" was from the coast is merely your judgment in the matter? A. Yes, sir.

Q. And what guided you in your judgment?

A. The steam whistle.

Q. The steam whistle of the light-house?

A. Yes, sir, and the whistle of the "Roanoke."

Q. How would the whistle of the "Roanoke" help you in telling how far the "Roanoke" was from the coast? A. It can't help us any.

Q. How did you arrive at the conclusion that the

(Testimony of F. G. Palmer.)

“Roanoke” was a mile or a mile and a half from Point Arguello? A. By our own vessel.

Q. How did you estimate that the nearest point the “Roanoke” was from the shore was a half or three-quarters of a mile?

A. By the sound of the whistle off Point Arguello.

Q. So that you thought the “Roanoke” was about one-half or three-quarters of a mile from Point Arguello? A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. But you have not any exact information as to the exact position of the “Roanoke” either from Point Arguello or from any other point on the coast?

A. No, sir.

Q. Could you hear any part of the surf while you were there? A. Very distinctly.

Q. You could?

A. That is what I judged the distance, by the land. You could hear it so very plainly and it seemed to [190—38] be running a pretty good swell by the sound of the surf.

Q. Counsel asked you whether if you owned the “Roanoke” you would rather have her go ashore south of the entrance to San Francisco, or Point Arguello? Now, if for any reason the “Roanoke” had dragged on the shore at Point Arguello and been impaled on any of those rocks there it would have been practically an impossibility to get her off, would it not? A. It depends on the weather.

Q. How do you mean it depends on the weather?

Mr. SOOY.—We object to that, Mr. Wall, on the

(Testimony of F. G. Palmer.)

ground it is incompetent, irrelevant and immaterial, and that it calls for expert testimony, and no foundation has been laid for it.

Mr. WALL.—Have the record show that the other side made the witness a witness of their own on this.

Mr. SOOY.—The cross-examination of the witness was merely for the purpose of getting at the witness' idea of coast line and the dangerous coast generally; it did not attempt to qualify the witness or get the witness' opinion as to how he would take the vessel on or off.

Mr. WALL.—Q. If a vessel like the "Roanoke" had gone on the beach at Point Arguello on the rocks, and the same vessel had gone on the sand beach south of San Francisco which position would be the more dangerous, leaving out the question of the assistance they could get also?

Mr. SOOY.—The same objection, it is assuming something not in evidence.

A. The rocky beach at Point Arguello.

Mr. WALL.—Q. You have never been inshore there where [191—39] the "Roanoke" was at anchor yourself, have you, never been inshore of her?

A. No, sir, never have been any closer before.

Q. So of your own knowledge you do not know what the condition of the bottom was inside of the "Roanoke"? A. No, sir.

Q. Of your own knowledge you do not know what the depth of the water was inside of the "Roanoke"? What the depth of the water was between the

(Testimony of F. G. Palmer.)

“Roanoke” and the shore? A. No, sir.

Q. Now, a vessel in San Francisco Bay—a vessel making a short voyage will not get out of her course as quickly as a vessel making a long voyage?

A. Yes, sir.

Q. Vessels running down the coast in foggy weather, what is the fact of their being likely to get out of their course? A. Very easy.

Q. What effect, if any, would the current have?

A. Currents have the effect that nobody knows at times and bad steering.

Q. I will ask you as a seaman whether it is not practically impossible for any vessel traveling in a fog to make an exact course over a course of 40 miles. Is it not practically impossible to make an exact course in the fog over a course of 40 miles?

A. You cannot even do it in 10 miles.

Mr. WALL.—That is all.

Recross-examination.

Mr. SOOY.—Q. Then if a vessel were anchored in the fog in the pathway of other vessels they are just as liable to hit her as they are liable to miss her?

A. What did you say?

Q. I say, suppose a vessel is anchored in the fog in the pathway of other vessels, those vessels then that are coming up and [192—40] down are just as liable to pass this vessel as they are to hit her?

A. I do not understand.

Q. I say, if you cannot steer a straight course you could not keep right in your pathway?

(Testimony of F. G. Palmer.)

A. No vessel can steer a straight course.

Q. Say the line of this table here is the regular pathway of vessels and there is a vessel anchored right in that pathway of vessels coming up and down, if they cannot steer a straight course and cannot keep in that pathway they are just as liable to miss that vessel as to hit her, in the fog?

A. They are liable to get more offshore, or more inshore.

Q. So that you would say she would be in less danger because she was anchored in the fair way than if she was anchored outside, would you not?

A. I would not; she certainly would be bound to be in danger being off as in.

Q. I am saying she was anchored there right in the pathway in foggy weather.

Mr. WALL.—I object to that unless the question is made more definite than that. It is not shown that there was any vessel in the place she ought to be and as a matter of fact there is a proper place where she ought to be.

Mr. SOOY.—Q. Assume the vessel is where she ought to be in the regular pathway of vessel coming in and going down, it is very foggy weather and the vessels coming in and going down cannot steer a straight course in foggy weather, so they would miss that vessel if they cannot keep their course?

Mr. WALL.—I object to that question; counsel can tell that just as well as the witness and the Court can tell it just as well as counsel or the witness.

(Testimony of F. G. Palmer.)

Mr. SOOY.—I want to get the witness' idea. [193—41]

Mr. WALL.—The idea of the witness is immaterial. Counsel knows it just as well as the witness and the witness and everybody knows it just as well as anybody of any reasoning faculty.

Mr. SOOY.—Q. Answer the question.

A. Well, I told you already it has a course outside of the ship. The ship is laying inside the straight course if the other ship is outside that ship.

Q. I am not assuming that the vessel is not inside. What I am saying—now, say the “Governor,” for instance, breaks her tail shaft and she anchors right on her regular run in the pathway of the vessels coming up and down the coast in the fog; now, you say a vessel cannot keep on her course in the fog for 10 miles? A. No, sir, she cannot do it.

Q. Then the vessels coming up and down would be more liable to miss the “Governor” than to hit her?

A. They are just as liable to hit her as to miss her.

Q. Are not the chances reduced?

A. Just the same.

Q. You have one-half a mile on one side of her and the whole Pacific Ocean on the other side of her?

A. Yes, sir.

Q. If she is lying end on to these vessels you have only got 35 or 40 feet. Now, you say the vessel is just as liable to run in that 35 feet or on the whole ocean on the other side?

A. I say it is just as liable to hit her as to miss her.

Q. Just the same? A. Just the same.

(Testimony of F. G. Palmer.)

Q. You mean now to say—here is 35 feet of vessel, you have got to come in that 35 feet to hit her?

A. 35 feet of vessel.

Q. How wide is the vessel?

A. It might be you do not hit her on the bow or stern, you might hit her in the side. [194—42]

Q. Suppose she is lying side on to you. How long is the “Santa Clara” or the “Roanoke”?

A. About 350.

Q. Then you have got here this 350 feet to hit her?

A. Yes, sir.

Q. You have got the whole Pacific Ocean on the other side?

A. The ship does not steer in the whole Pacific Ocean.

Q. You have got that on that side?

A. Yes, sir.

Q. And you have got one-quarter of a mile inside?

A. Yes, sir.

Q. Then you mean to tell me there is as much chance in hitting that vessel as missing her?

A. Yes, sir, certainly.

Q. I do not want to argue with the witness. Let me make this clear to you. You know some mathematics, don't you? A. Yes, sir.

Q. Now, here is the pathway of the vessel. Just assume this rough diagram here is the whole Pacific coast here. Here is a mile and a half to the coast in there. Now, then, a vessel coming down here has got to get—this would be the size of the vessel, 300 feet. That vessel has got to hit that 300 feet, has it not?

(Testimony of F. G. Palmer.)

A. Yes, sir.

Q. In order to hit that vessel? A. Yes, sir.

Q. What about this 300 feet, this 300 feet, this 300 feet, and that 300 feet and so forth out here?

A. No, sir, except that the quartermaster at the wheel gets steering bad to the inside she will either hit the vessel or shore and steering on the outside she will get to Honolulu. She does not steer that course all the time.

Q. She keeps this 300 feet of her course?

A. No, sir, it all depends on the distance.

Q. Suppose the vessel is half a mile outside the course? [195—43]

A. Another vessel running wild one-half mile off her course too?

Q. This vessel one-half mile off her course would be hit by this vessel running wild?

A. No, sir. That man lets her run out and another fellow comes and lets her run inside.

Q. But if a vessel comes one-half mile off her course off Point Arguello, then you would say she would not be on her course, would you?

A. One-half of a mile, that is not very much. It all depends how far you are running. One-half a mile is not very much in a run of 40 or 50 miles.

Q. If a vessel is one-half a mile off her course you would say that is not very good steering?

A. What distance?

Q. Say going from here to San Diego she got off Point Arguello she was one-half mile inside of her

(Testimony of F. G. Palmer.)

course, would you say that was good steering?

A. Good steering, it is very good.

Q. If a vessel is within three-quarters of a mile of Point Arguello, would you say that is good steering?

A. If inside Point Arguello three-quarters of a mile and running it would be running on shore.

Q. I say three-quarters of a mile off, is that good seamanship? A. No, sir, one mile and a quarter.

Q. If a vessel is within three-quarters of a mile, that is she is three-quarters of a mile off Point Arguello, she is out of her course, is she not?

A. A little.

Q. Out of the course of other vessels?

A. Yes, sir.

Q. She is one-half a mile out of the course of other vessels passing up and down, is she not?

A. Yes, sir.

Mr. WALL.—Q. When you spoke of the track of vessels going up and down the coast, the track of vessels depends upon the depth of the vessel, does it not?

A. The draft of the [196—44] vessel.

Q. And the path of vessels going up and down the coast is not a narrow line, is it? A. No, sir.

Q. It extends over a considerable distance?

A. To the outside.

Q. And varies a good deal upon the individual navigator of each vessel? A. Yes, sir.

Q. Some masters stand well in and some stand out?

Mr. SOOY.—Objected to as leading and not

(Testimony of F. G. Palmer.)

proper redirect examination.

Mr. WALL.—The form of the question may be leading. I will withdraw it, the form of the question and get the same thing in this way.

Q. State what the custom is in regard to navigating up and down the coast as to different captains of different ships and the different drafts of different vessels.

A. The usual master wants a man to steer outside a while and then go inside a while. The captain is not running the steering, the mate and quartermaster is steering; and you have mates running everything inside, they are scared; then you have mates running everything outside, they are offshore. There are some who want to see the land. You have some mates running everything outside, and I had it happen once when we were off Point Reyes coming down from Eureka inshore he was six miles outside of us. That is one kind of mate. The other kind of mate is more careful, he don't care how much he goes out to sea and only starts to go inshore when he nears his destination.

Q. As to the draft, what effect does that have in keeping [197—45] inshore or offshore?

A. There is parts along the coast—there are places all along the coast that are not deep enough for vessels to pass all outside of four miles channel. A vessel of 30 feet cannot go there, but a vessel of 20 feet can.

Q. If there is no fog and the points are clearly visible, state what use, if any, those points can be

(Testimony of F. G. Palmer.)

made use of in steering.

A. They use the points to hold her in or out; if she is steering too far off they hold her in.

Mr. SOOY.—Q. Would you say that a vessel one-half of a mile of Point Arguello is in the regular pathway of vessels? A. No, sir, she is inside.

Q. She is three-quarters of a mile inside of the regular pathway? A. Yes, sir.

Q. In other words, vessels keep out a mile and a quarter or a mile and one-half of Point Arguello, do they not? A. Yes, sir.

Mr. WALL.—Q. That is, they aim to keep that distance off in good weather?

A. That is their aim, but they cannot do it.

Mr. SOOY.—Q. They are supposed to keep off that far? A. Yes, sir.

Q. Good seamanship would require it?

A. It might be a good seaman—he might get farther in and he might get farther out.

Mr. SOOY.—That is all. [198—46]

United States of America,

State and Northern District of California,

City and County of San Francisco,—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that pursuant to the order of reference made to take and report the testimony herein that on Monday, July 14th, 1913, I was attended by F. R. Wall, Esq., proctor for the libelant and C. H. Sooy, Esq., proctor for claimant, and by the witness F. G.

Palmer, who was of sound mind and lawful age, and that the said witness was by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause; that the foregoing testimony was taken in shorthand by Herbert Bennett, a competent stenographer, and afterwards reduced to typewriting, pursuant to such order of reference.

In witness whereof, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 15th day of July, 1913.

FRANCIS KRULL,

U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed Sept. 15, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [199—
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*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

OSKAR JOHANSEN et als.,

Libelants,

vs.

The Steamer "ROANOKE," etc.,

Claimant.

Thursday, August 21st, 1913.

TESTIMONY TAKEN ON REFERENCE BEFORE FRANCIS KRULL, U. S. COMMISSIONER.

APPEARANCES.

F. R. WALL, Esq., for the Libelants.

DAVID LEVY, Esq., for the Respondent.

[200—1]

[Testimony of Richard Dickson, for Libelants.]

RICHARD DICKSON, called for the libelants, sworn.

Mr. WALL.—Q. Captain, what is your business or occupation? A. I am a seafaring man.

Q. You were such on the 10th of April last?

A. Yes, sir.

Q. In what capacity were you engaged at that time? A. Master of the steamer “Roanoke.”

Q. When you were subpoenaed, Captain, you were subpoenaed to bring with you the ship’s log and the official log of the “Roanoke” covering the 10th day of April, 1913? A. Yes, sir.

Q. Have you those with you? A. I have.

Q. Let me see the ship’s log first?

A. This is the official log and that is the pilot-house log (indicating).

Q. Captain, I find an entry in the pilot-house log-book under date of April 10th, 1913, arrived 10:05; is that 10:05 in the morning?

A. That is 10:05 in the morning; forenoon.

Q. “Ship stopped, propeller or some blade off propeller gone.” I will ask you if you found out what

(Testimony of Richard Dickson.)

blade of the propeller was gone.

Mr. LEVY.—Objected to on the ground no proper foundation is laid.

Mr. WALL.—Q. Go ahead and answer it subject to the objection.

A. I found out that the tail shaft was gone; the tail shaft was broken, and also two blades of the propeller.

Q. Just explain briefly and fully so the Court will understand what is meant by the tail shaft.

A. The tail shaft is what drives the propeller; the shaft that goes from the engine to the propeller through a big [201—2] tube through the stern of the ship; the shaft was 15 inches in diameter and it drives the propeller which drives the ship.

Q. You say that you found the tail shaft was gone?

A. Yes, sir.

Q. How did you find that?

A. Seeing the propeller was pulled out of the stern tube and up against the rudder-post.

Q. And when the propeller was pulled out of the stern tube and up against the rudder-post how much room was there then between the tail shaft and the tube?

A. There was no room because the tail shaft was broken in the stern tube between the first and second line up.

Q. The tail shaft turns around in the stern tube, does it not? A. Yes, sir.

Q. There would have to be some room in order for it to turn around; it did not fit in there tight?

(Testimony of Richard Dickson.)

A. It never fits tight; there is a gland from the outside and one from the inside which keeps the water from going through; the tail shaft was right in between, what we call in between the two liners.

Q. How far abaft was the tail shaft pushed after you found it out from its original position?

A. That I do not recall; it was pulled right up against the rudder-post, tight.

Mr. LEVY.—Q. Did you see all these things?

A. I did, looking over the stern of the ship down to the water; the water was kind of clear and I could see the propeller was up against the stern or the rudder-post; that I knew then that the shaft was gone.

Mr. WALL.—Q. After you discovered that what did you do with the “Roanoke”?

A. We lay adrift there until we got an anchorage and dropped [202—3] anchor in 15 fathoms of water, or about $14\frac{1}{2}$ or 15 fathoms of water to the best of my recollection.

Q. The entry in the log-book is “dropped anchor in $14\frac{1}{2}$ fathoms of water”? A. Yes, sir.

Q. Were there any soundings taken?

A. Yes, sir, with the main lead line.

Q. And it was between 14 and 15 fathoms of water where you anchored?

A. Where we anchored after we drifted in there.

Q. And the position at noon according to the entry; what is that?

A. $11\frac{1}{2}$ miles south southwest of Point Arguello.

Q. Now, was that bearing by compass magnetic or true?

(Testimony of Richard Dickson.)

A. The second officer said he seen the light-house; I did not see that myself; it was a foggy day, very thick.

Q. What I mean, was the entry in the log-book here—

A. (Intg.) That was by magnetic bearing.

Q. The entry of $11\frac{1}{2}$ miles south southwest of Point Arguello, the south southwest would be a magnetic bearing? A. Yes, sir.

Q. And not a true bearing?

A. Not a true bearing; two degrees to the best of my recollection; two degrees westerly deviation of that compass.

Q. Do you mean two degrees or two points?

A. Two degrees.

Q. Westerly deviation? A. Yes, sir.

Q. Do you know how much variation?

A. Variation down there to the best of my recollection is somewhere around 17 degrees, between 16 and 17 but I am not positive of that now.

Q. I will read this entry in the log-book Captain so that you can testify intelligibly in regard to it. 10:30, that is [203—4] in the forenoon, is it?

A. Yes, sir.

Q. "Lowered boat, found two blades of propeller gone and shaft damaged. 11:10 dropped anchor in $4\frac{1}{2}$ fathoms of water. 60 fathoms of chain. Position at noon, $11\frac{1}{2}$ M. S. S. W. of Pt. Arguello. 4:45," that is in the afternoon, is it not, Captain?

A. Yes, sir.

Q. "4:45 S. S. 'Santa Clara' arrived. 5:20 anchor

(Testimony of Richard Dickson.)

up proceeded in tow of 'Santa Clara.' " You say you did not yourself at any time see the light-house on Point Arguello? A. I did not.

Q. What prevented you from seeing it?

A. The fog. Pardon me, I see the light before we broke the propeller probably about eight or 10 miles south of Arguello, but not after we broke the propeller; it cleared up, that was before we broke the propeller.

Q. That was before you broke the propeller?

A. Yes, sir.

Q. That was all on the 10th of April?

A. On the 10th of April to the best of my recollection.

Q. I will show you the log-book for April 10th, 1913, the entry opposite 10 o'clock running over in one of the columns to the right is entered fog, what was the condition of the fog at that time?

A. It was thick fog.

Q. Thick fog at 10 o'clock at that time? The entry above at 1:41 A. M., is also an entry of fog?

A. That is the time the fog begun.

Q. That is the time the fog began?

A. And stayed with us all night until about 8:12 in the morning, and she lighted then; that is the time we saw everything, Point Arguello light-house, saw it for about 20 minutes, then the fog bank shut in again and from that I did not see it. [204—5]

Q. Captain, in the last column, April 10th, 1913, opposite the entry 11:10, I will ask you to read what that entry is there? A. Light westerly swell.

(Testimony of Richard Dickson.)

Q. Light westerly swell?

A. Yes sir, that is light westerly swell.

Q. That means that the swell was setting towards the westward? A. Coming in from the westward.

Q. And setting towards the eastward?

A. Yes, sir.

Q. And the same entry down here 7:40?

A. That was the same thing, I think.

Q. That is the same entry?

A. No, sir, light northwest swell.

Q. That means the swell was coming from the northwest and setting to the southeast?

A. Yes, sir.

Q. And down here of midnight of that day, gentle westerly swell? A. Yes, sir.

Q. That was midnight of the 10th? A. Yes, sir.

Q. And the entry on the 10th opposite 11:10 A. M., under the head "wind," is marked as Z?

A. That is calm, no wind.

Q. That means calm? A. Yes, sir.

Q. Is this the official log? A. Yes, sir.

Q. The entry in the rough log that you have been testifying from as the rough log is kept in the pilot-house?

A. Yes, sir, and this is what we call the official log.

Q. This is written up by the first officer on the ship?

A. Every day from the pilot-house log-book entry.

Mr. LEVY.—Q. The man that writes up this log-book does not necessarily—

Mr. WALL.—That is cross-examination.

(Testimony of Richard Dickson.)

Q. I show you the book in regard to which you have been [205—6] testifying, the last book that you have been testifying to and what you call the official log-book; is that correct?

A. That is the only log-book that I know of aboard the ship.

Q. Where did you get this book that you call the official log-book; when you brought it up here where did you get it?

A. On board the ship.

Q. What ship?

A. "Roanoke."

Q. Where did you find it, where was it?

A. In the mate's room; I sign it every day and look it over.

Q. When you brought it up here to-day you found it in the mate's room?

A. Not to-day.

Q. When?

A. When I was subpoenaed that time.

Q. When you got the subpoena you went into the mate's room and got this book?

A. Yes, sir.

Q. And it has been in your custody since that time?

A. No, sir.

Q. Where has it been?

A. I took it to the attorneys.

Q. That day?

A. Yes, sir.

Q. And left it with them?

A. Yes, sir.

Q. Has it been there since that time?

A. Yes, sir.

Q. Where did you get it to-day when you brought it out here?

A. At the attorneys.

Q. I will ask you if as master of the vessel you looked it over every day?

(Testimony of Richard Dickson.)

A. Every day we look that book over.

Q. The master does?

A. Yes, sir, to see if the entries is correct, or not.

Q. Captain, I will ask you to read the entries in this book beginning with the entry opposite 10:05 A. M. on Thursday, April 10th, 1913, down to and including the entry which I [206—7] indicate to you with my finger; all of the entries in the log-book?

Mr. LEVY.—I shall object to an answer being given to that question or to the captain reading from that book, and I claim the right to cross-examine this witness in order to lay a foundation for my objection.

The COMMISSIONER.—Let the question be answered; you have entered your objection and you can cross-examine the witness after Mr. Wall gets through with his examination.

Mr. LEVY.—I take an exception to the ruling on the ground I have had no opportunity to bring out the facts regarding this book so that my objection may have any foundation.

Mr. WALL.—Q. Answer the question subject to the objection.

A. "10:05 ship stopped. Propeller or some blades of propeller gone. Log in. 10:30 Lowered boat. Found shaft broken and two blades knocked off wheel. 11:30 dropped anchor in 14½ fathoms—60 fathoms chain. 12:00 position at noon 1½ S. S. W. of Pt. Arguello. 1:15 P. M. secured wheel by means of chains hove taut to waischocks. 4:45 S. S. Santa Clara arrived in response to wireless call. 5:20 up

(Testimony of Richard Dickson.)

anchor and proceeded in tow of S. S. Santa Clara. 5:45 course magnetic N. W. $1\frac{1}{2}$ W. 5:45 Pt. Arguello whistle and log astream. 7:40 change courses N. N. W. 8:00 P. M. fog, calm, smooth."

Q. What is this indorsement there on the bottom, Captain? A. That is my name.

Q. R. Dickson, master? A. Yes, sir.

Q. That is, you looked it over and it met with your approval [207—8] and you signed it?

A. Yes, sir.

Q. Go ahead and read the afternoon entries.

A. This is the next day.

Q. The first entry on April 11th is 1 A. M.?

A. Yes, sir.

Q. April 11th, 1913? A. Yes, sir.

"1 A. M. courses N.N.W. $17\frac{1}{2}$ various courses, fog, calm, smooth. 4:00 A. M. drifting about off Port San Luis. 6:45 anchored at Port San Luis 10 fathoms. In hauling in tow line hawser fouled bottom, and when later the tug 'Sea Rover' attempted to recover same hawser carried away and 40 fathoms of $11\frac{1}{2}$ " wire cable was lost, as well as portion of hawser, and the part of hawser recovered was badly chafed by fouling rocks. Original length of hawser 120 fathoms. Capstan shaft broken heaving on wire cable. 10:30 tug 'Sea Rover' arrived port Bow bits cracked by wire cable. 2:00 P. M. up anchor and proceeded in tow of 'Sea Rover.' 2:15 whistling buoy abeam."—

Q. That is all I want. A. Yes, sir.

Mr. WALL.—I am going to offer in evidence, Mr.

(Testimony of Richard Dickson.)

Levy, as Libelants, Exhibit Dickson 1, the book that the captain testified as the official log so far as relative to the entry to be found therein under date of Thursday, April 10th, 1913, and Friday, April 11th, 1913, unless you want to stipulate that these entries—

Mr. LEVY.—Saving my objections already made and exceptions also, I will stipulate that what has been read is contained in the book which is referred to. I also make the objection to the introduction of this book and its contents upon the ground that it is irrelevant and immaterial and upon the further ground that I have not had [208—9] no opportunity to cross-examine the witness so as to bring out the character of the book.

Mr. WALL.—Q. Captain, you were also subpoenaed to bring certain originals of certain wireless messages received and sent by you; have you got those with you?

A. I turned them over to our attorney, Mr. Levy.

Q. I will show you, Captain, what purports to be certain wireless messages and will ask you to look them over and state whether or not you sent or received the messages therein referred to either as it appears or substantially as it appears. First, I call your attention to Libelants' Exhibit 1, and ask you if you sent substantially that message to Mr. Doe.

A. Yes, sir, to the best of my belief, I did; although I don't see where they get that 10.

Q. The wireless operator would put the time of sending it, would he not?

(Testimony of Richard Dickson.)

A. He ought to, but it does not seem he has there. The tail shaft was not broken until 10:05, and I would not send it before the tail shaft broke.

Q. I will show you Libelants' Exhibit 2, which purports to be to Doe, San Francisco, signed Dickson.

A. Yes, sir, I acknowledge that as having been sent by me.

Q. And one marked Libelants' Exhibit 3, in the corner. A. Yes, sir.

Q. You acknowledge that as sent by you?

A. Yes, sir.

Q. And the one marked No. 4? A. Yes, sir.

Q. And the one marked No. 5, purporting to be to Captain Jessen of the "Santa Clara" and signed by you?

A. There is a mistake there; it should have been three miles instead of two; that is another mistake of the wireless.

Q. It should have been three miles instead of two.
[209—10] A. Yes, sir.

Mr. LEVY.—Three miles what?

Mr. WALL.—Q. Three miles south.

A. To the best of my recollection I sent three instead of two.

Q. Otherwise you acknowledge the message substantially as it was sent? A. Yes, sir.

Q. And No. 6, which purports to be to you from Doe? A. Yes, sir.

Q. You acknowledge receiving that, do you?

A. Yes, sir.

(Testimony of Richard Dickson.)

Q. And No. 7, which purports to be to you from Doe? A. Yes, sir.

Q. You acknowledge receiving that from Doe?

A. Yes, sir.

Q. No. 8, which purports to be to Jessen from you?

A. Yes, sir.

Q. You acknowledge as having sent that?

A. Yes, sir.

Q. No. 9, which purports to be to Jessen from you?

A. Yes, sir, except that two miles; that is one thing that I do not remember saying.

Q. You think you said three instead of two?

A. Yes, sir, to the best of my belief I think I said three instead of two.

Q. No. 10, to Jessen from you? A. Yes, sir.

Q. You acknowledge as having sent that to Captain Jessen, do you? A. Yes, sir.

Q. And No. 11, to you from Jessen?

A. Yes, sir.

Q. You acknowledge receiving that?

A. Yes, sir.

Q. No. 14, purporting to be to you from Jessen?

A. Yes, sir.

Q. You acknowledge having received that?

A. Yes, sir.

Q. No. 18, purporting to be to you from Jessen?
[210—11] A. Yes, sir.

Q. You acknowledge having received that from Jessen? A. Yes, sir.

Q. Captain, what time did the "Santa Clara" pick up the "Roanoke"?

(Testimony of Richard Dickson.)

A. To the best of my belief she arrived there—to the best of my recollection she arrived there at 4:45 by our time.

Q. In the afternoon? A. Yes, sir.

Q. And either prior thereto or at any time immediately subsequent thereto were there any other vessels in the immediate locality?

A. There was several of them.

Q. What one or ones did you see?

A. I did not see any, it was that foggy; I could not see any.

Q. Didn't any come in sight at all?

A. One steam schooner.

Q. What steam schooner was that?

A. I do not remember that either; I did not see his name, he went right by us.

Q. Did you send or instruct any of your wireless operators to send out any wireless messages to any vessel or vessels except the "Santa Clara"?

A. I had the operator find out what ships were around in case we should need them?

Q. Just what did you tell him to do?

A. To send and find out just what ships were around.

Q. Did he make any report to you in regard to that message? A. He did.

Q. What did he say to you?

A. He said that he had picked up the "Santa Clara" first.

Q. Did he tell you at any time that he had picked up the "Willamette"? A. He did.

(Testimony of Richard Dickson.)

Q. Did you tell him to send any message to the "Willamette"?

A. He came to me and said that the "Willamette" was around; [211—12] I did not ask him whereabouts, thinking that she must be close up. I asked him to have her come around by us and if he would stay by us, thinking that if the passengers should be of the opinion that they wanted to move away from the "Roanoke" I would put them on her, but I never for a moment thought that I would take any assistance from any of them after I found that the "Santa Clara" was coming down south.

Q. What time did you arrive off Port San Luis?

A. That was in the morning.

Q. Of the 11th?

A. To the best of my recollection somewhere around three or four o'clock in the morning; I am not positive of that.

Q. To the best of your recollection it was somewhere around three or four o'clock in the morning of the 11th? A. Yes, sir.

Q. It took you from 4:45 on the 10th to somewhere around three or four on the 11th to arrive off Port San Luis? A. Yes, sir.

Q. What, when you arrived, did you do until daylight?

A. We lay off there for two or three hours until we went in.

Q. Did you remain stationary or were you cruising back and forth?

A. He was cruising back and forth with us.

(Testimony of Richard Dickson.)

Q. You did not anchor? A. No, sir.

Q. Why not? A. That I do not know.

Q. Have you been in Port San Luis often?

A. Nine years running in there from two to three times a month.

Q. And what is the character of the port and the approaches from the seaside?

A. It is a breakwater there which [212—13] forms the port and the harbor inside.

Q. I mean as to the character of the approaches in the vicinity of the breakwater?

A. It is a good opening; plenty of water.

Q. In the entrance itself?

A. Yes, sir, there is a bell buoy pretty well south, about—well, about two or three miles south.

Q. I mean on each side of the entrance, say a distance of two or three miles?

A. It is an open roadstead.

Q. I mean as to the character, whether there are any islands there?

A. One only; there is an island where the breakwater is built out of.

Q. Captain, how long have you been master of vessels? A. Since 1898.

Q. And hold a license for any character of steam and sail?

A. In the ocean, unlimited steam and sail.

Q. And before you were master how long were you first officer?

A. I was second officer and first officer since 1889.

Q. And during that time you have navigated many

(Testimony of Richard Dickson.)

vessels, have you not?

A. In the neighborhood of 11 or 12; about 11 I think it is.

Q. I will ask you to plot the position of the "Roanoke" on Libelants' Exhibit Palmer No. 1, Coast and Geodetic Survey Chart 5300, $11\frac{1}{2}$ miles south southwest magnetic of Point Arguello. There was a quarter of a point of westerly deviation?

A. Yes, sir.

Q. You have plotted the position of the "Roanoke" $11\frac{1}{2}$ miles south southwest of Point Arguello magnetic with a deviation of the ship's compass of two degrees westerly deviation, and I will ask you to put a large Capital A on [213—14] the position you have plotted on the chart?

A. Before I will say, that is according to the second officer's statement when he said he thought he saw Point Arguello Light-house, but it might not have been so; the sound of the whistle sounded more like south to me than south southwest.

Mr. LEVY.—Q. And you are just figuring here according to somebody else's statement?

A. Yes, sir, and from the log-book according to the second officer's statement when he thought he saw the light-house.

Mr. WALL.—Q. You were asked to plot the position on the chart from that particular data?

A. Yes, sir.

Q. I will ask you to mark the position that you have plotted with a large capital A so as to show that it is the little period inside the circle just to the left

(Testimony of Richard Dickson.)

of the letter R in Rocky Point? A. Yes, sir.

Q. The point or period surrounded by a circle just above 22, the figure 22 and just to the left of the letter R in Rocky Point is the position you have plotted according to that data?

A. From the data I have got; but myself I claim we were south or probably east of south.

Q. You know, as a matter of fact, do you not, Captain, that actually you were in between 14 and 15 fathoms of water? A. Yes, sir.

Q. You know that yourself? A. Yes, sir.

Q. So that as a matter of fact in order to be in 14 or 15 fathoms of water—

A. (Intg.) We should be about here.

Q. Put a period where you said “we should be about here”?

A. Yes, sir; we should be somewheres in that neighborhood.

Q. I will ask you to draw a circle around that, Captain, [214—15] where you say we should be somewheres around that neighborhood and put a capital B there? A. Yes, sir.

Mr. LEVY.—I object to this testimony as being incompetent.

Cross-examination.

Mr. LEVY.—Q. Captain, in one of these messages you talk about having passengers on board, is that the reason why you wanted assistance at once?

A. Yes, sir.

Q. Was it the situation of the vessel that needed assistance? A. No, sir.

(Testimony of Richard Dickson.)

Q. Or just because you had passengers and thought they might want to get away from the "Roanoke," and thought they might not want to be delayed a long time? A. Yes, sir.

Q. In the message you sent in regard to need of assistance at once you had that in view, is that right?

Mr. WALL.—We object to that as not proper cross-examination and also further the witness is the master of the vessel belonging to the claimant in this case, and also the questions are leading.

A. Yes, sir.

Q. This book here that you have referred to as the official log; that is not written by the man who takes down the data, is it?

A. He is a bridge officer; there is three bridge officers, the first, second and third officers stand watch and watch on the bridge.

Q. The officer on the bridge writes in the smaller book, the first one that was considered this afternoon? A. Exactly.

Q. Then the first officer writes what he finds in this first book, the bridge-book and transcribes it into this second so-called [215—16] official log-book? A. Yes, sir.

Q. But the first officer did not write down all those items in the first book, did he? A. No, sir.

Q. The first officer was not present when all those items were written down in the first book, was he?

A. He was on duty around the decks getting the boats and lines ready.

Q. He was not there making these notes?

(Testimony of Richard Dickson.)

A. No, sir.

Q. Had nothing to do with making the notes?

A. No, sir.

Mr. LEVY.—That is all.

Redirect Examination.

Mr. WALL.—Q. The first officer was around the deck during all that time?

A. He was around the deck, but he was not on duty?

Q. Does he not stand on deck watch also?

A. Eight hours a day.

Q. Eight hours a day he stands a deck watch?

A. Yes, sir.

Q. And you have how many officers? A. Three.

Q. And they each take turns four hours on and eight hours off? A. Yes, sir.

Q. During the time from 10 o'clock in the morning—from 10 o'clock in the morning of the 10th until 1 o'clock in the morning of the 11th, the first officer would have a deck watch? A. From when?

Q. From one o'clock in the morning of the 10th until one o'clock in the morning of the 11th he would have one or more deck watches?

A. The first officer's watch is from 4 to 8 morning and afternoon.

Q. As a matter of fact the first officer was on deck at 10 o'clock during that time? A. No, sir. [216—17]

Q. The first officer is on what time?

A. 4 to 8 morning and afternoon.

Q. He was on watch from 4 to 8 of the 10th in the

(Testimony of Richard Dickson.)

afternoon, was he not? A. Yes, sir.

Q. So that he was on watch for four hours during that time? A. Yes, sir.

Q. And he was also about the deck during the day looking after his duties as first officer?

A. Between 5 and 6 he was putting the line on the "Santa Clara."

Q. So as a matter of fact the first officer was around on the decks during the whole of the time that the "Roanoke" was being picked up by the "Santa Clara," was he not?

A. He was not on duty all the time.

Q. He was around the deck? A. Yes, sir.

Mr. LEVY.—Q. He had nothing to do with writing these notes in the small book that was used first?

A. Not except when he was on watch. [217—18]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that pursuant to the order of reference made to take and report the testimony herein that on Thursday, August 21st, 1913, I was attended by F. R. Wall, Esq., proctor for the libelant, and David Levy, Esq., proctor for claimant, and by the witness Richard Dickson, who was of sound mind and lawful age, and that the said witness was by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause; that the foregoing testimony was taken in shorthand by

Herbert Bennett, a competent stenographer, and afterwards reduced to typewriting, pursuant to such order of reference.

In witness whereof, I have hereunto subscribed my hand at my office in the city and county of San Francisco, State of California, this *15th* day of September, 1913.

FRANCIS KRULL,

U. S. Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Sept. 15, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [218—
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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 7th day of October, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,401.

OSKAR JOHANSEN et al.,

vs.

Str. "ROANOKE," etc.

Order Filing Opinion, etc.

This cause having been heretofore submitted to the Court for decision, now after due consideration had the Court filed its written opinion and by the Court

ordered that a Decree be entered herein for the sum of \$887.50, being for one-half month's pay to be distributed to the persons named in the memorandum attached to the opinion filed. [219]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,401.

OSKAR JOHANSEN et al.,

Libelants,

vs.

The Steamer "ROANOKE" et al.,

Respondents.

Order that Decree be Entered.

On April 10th, 1913, the steamer "Roanoke," bound from San Pedro to San Francisco, with 93 passengers and a cargo of freight, lost her propeller when in the neighborhood of Point Arguello. She drifted inshore from 10:05 A. M. until 11:10 A. M., when the anchor was dropped in 14½ fathoms of water at a point in the neighborhood of 1½ miles south by east of Point Arguello. There was no wind and the sea was calm, with a light swell from the west. During the time that she remained so anchored, that is, until about 5:20 P. M., she was enveloped in a dense fog, and not more than a half mile to the eastward of the regular course of vessels plying along the coast. No rough weather was encountered during this period, the sea remaining calm

and there being no wind. The anchor held without any apparent strain. The coast in that neighborhood is rocky in some places and sandy in others. The steamer "Santa Clara" en route from San Francisco to Port Harford, about 10:45 A. M. received the following message from the "Roanoke":

"Capt. Jessen, S. S. 'Santa Clara,'

Come to our assistance, lost wheel two miles South Point Arguello.

DICKERSON." [220]

To which he replied about 10:55 A. M.:

"Capt. Dickerson, S. S. 'Roanoke,'

Your message received. Coming to your assistance.

JESSEN."

At 12:07 the master of the "Roanoke" sent to the "Santa Clara" the following message:

"Jessen, 'Santa Clara,'

We need your assistance at once.

DICKERSON."

Upon receipt of the first message the "Santa Clara" altered her course and steamed directly for the "Roanoke," arriving there about 4:45 P. M., and took her in tow for San Luis where they arrived about 4 A. M., and where the "Roanoke" anchored about 6:45 A. M. outside the breakwater. She remained there until 11 A. M. when the tug "Sea Rover," dispatched from San Francisco for that purpose, took her in tow and finally landed her at her dock at the latter place. The "Santa Clara" dropped her at San Luis in obedience to the orders of the President of claimant, the North Pacific

Steamship Company, the owner of both steamers, but was always near enough to assist until the tug arrived. The present libel is by the crew of the "Santa Clara" for salvage.

It is evident that while the sea remained calm and the anchor held, the "Roanoke" would not be in any immediate danger. But on this coast in the month of April it is impossible to say how long such conditions would continue. A vessel so disabled as to be without motive power, within $11\frac{1}{2}$ miles of a rocky coast, may, if not relieved, reasonably apprehend danger. The telegrams of the master of the "Roanoke" would indicate that he believed that [221] he was in need of assistance, and the circumstances were such as to render that belief very reasonable. The fact that the danger was not immediately imminent is not at all controlling. It is contended that this was a towage instead of a salvage service; but to this contention I am unable to agree, "A salvage service is a service voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger." *McConnochie vs. Kerr*, 9 Fed. 50. The services here rendered were salvage services. Both steamers belonging to the same owners, there is no claim made on behalf of the steamer "Santa Clara," the action being solely in behalf of the crew—with the exception of the master and the engineer who make no claim. The value of the "Roanoke" was

stipulated to be \$150,000.00, she was relieved without any difficulty by the "Santa Clara" with her own lines brought aboard the "Santa Clara" by her own crew. No hardships or special dangers were undergone by the "Santa Clara's" crew, and under all the circumstances I think one-half a month's pay to each of the crew will be ample compensation. This award is made for the reason that all salvage awards should be fairly substantial so that vessels and crews may be rather encouraged to render such services than discouraged from so doing.

A decree will be entered for \$887.50, being for one-half month's pay, which will be distributed to the persons named in the annexed memorandum.

October 7th, 1913.

M. T. DOOLING,

Judge. [222]

Office.	Name.	Salary.
Second Officer	Sjogren	85.00
Third " "	J. E. Johnson	70.00
1st Asst. Engineer	Disher	100.00
2d " "	Reed	90.00
3d " "	Jacobs	80.00
Seaman	Becker	50.00
"	Meislahn	50.00
"	Cain	50.00
"	Palmer	50.00
"	Christenson	50.00
"	A. Johnson	50.00
"	Johansen	50.00
"	A. Anderson	50.00
"	E. Anderson	50.00

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" Andreasson	50.00
1st Cook J. Pitts	75.00
2d " Martin	60.00
3d " W. E. Pitts	45.00
Pantryman Andrews	50.00
Mess Boy	..... Tennant	35.00
Purser	..... Frankel	90.00
Wireless Operator	.. K. G. Clark	40.00
Fireman	..... Matson	55.00
"	..... Fraser	55.00
Wiper	..... Staley (Fahey)	45.00
Oiler	..... Kremer	45.00
"	..... Caskey	45.00
"	..... Nelson	45.00
Waiters	..... A. G. Clarke	30.00
[223]		
"	..... Kotcharin	50.00
"	..... Gibson	35.00
"	..... Hansen	50.00

[Endorsed]: Filed Oct. 7, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [224]

At a stated term of the District Court of the United States of America in and for the Northern District of California, First Division, held at the United States Postoffice and Court Building, in the city of San Francisco, State of California, on Thursday, the 9th day of October, 1913. Present: The Hon. M. T. DOOLING, District Judge.

No. 15,401.

OSKAR JOHANSEN et als.,

Libelants,

vs.

The Steamer "ROANOKE," etc.

Final Decree, etc.

**FINAL DECREE IN BEHALF OF CERTAIN
LIBELANTS.**

This cause having been brought on regularly for hearing upon the pleadings and proof, and the advocates of the respective parties having been heard, and the Court having deliberated upon and considered all and singular the premises herein, the Court now finds that services rendered by the crew of the "Santa Clara" were salvage services; that there is due to each of the libelants herein mentioned, as members of the crew of the "Santa Clara," for salvage services, the sum set opposite to the name of each libelant, to wit:

Second Officer	..... A. Sjorgren	..... \$42.50
Third Officer	..... J. E. Johnson	..... 35.00
First Asst. Engr.	.. A. Disher	..... 50.00
Second " "	.. Geo. M. Reed	..... 45.00
Third " "	.. G. W. Jacobs	..... 40.00
Seaman	..... Geo. K. Bekker	..... 25.00
Seaman	..... M. Meislahn	..... 25.00

[225]

Seaman P. Cain 25.00
Seaman F. G. Palmer 25.00
Seaman Christen Christensen	.. 25.00

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Seaman A. Johnsen	25.00
Seaman Oskar Johansen	25.00
Seaman A. C. Andersen	25.00
Seaman	..... E. Andersson	25.00
Seaman	..... H. Andreassen	25.00
First Cook	..... J. Pitts	37.50
Second Cook	..... J. Martin	30.00
Third Cook	..... W. E. Pitts	22.50
Pantryman	..... E. Andrews	25.00
Messboy	..... R. Tennant	17.50
Purser	..... B. Frankel	45.00
Wireless Operator	.. K. G. Clark	20.00
Fireman	..... V. Matson	27.50
Fireman	..... A. Fraser	27.50
Wiper	..... M. Staley (Fahey)	22.50
Oiler	..... W. Kremer	22.50
Oiler	..... A. S. Caskey	22.50
Oiler	..... S. B. Nilsen	22.50
Waiter	..... A. G. Clarke	15.00
Waiter	..... J. Kotcharin	25.00
Waiter	..... C. Gibson	17.00
Waiter	..... Hansen	25.00

And the Court further finds that each of said sums of money due to each of said libelants as aforesaid is a lien on the said steamer "Roanoke." Now, therefore,—

It is Ordered, Adjudged and Decreed that each of said libelants recover for said salvage services the sum set opposite to the name [226] of each of said libelants as follows, to wit:

A. Sjogren.....	\$42.50
J. E. Johnson.....	35.00
A. Disher.....	50.00
Geo. M. Reed.....	45.00
G. W. Jacobs.....	40.00
Geo. K. Bekker.....	25.00
M. Meislahn.....	25.00
P. Cain.....	25.00
F. G. Palmer.....	25.00
Christen Christensen.....	25.00
A. Johnsen.....	25.00
Oskar Johansen.....	25.00
A. C. Andersen.....	25.00
E. Andersson.....	25.00
H. Andreassen	25.00
J. Pitts.....	37.50
J. Martin.....	30.00
W. E. Pitts.....	22.50
E. Andrews.....	25.00
R. Tennant.....	17.50
B. Frankel.....	45.00
K. G. Clark.....	20.00
V. Matson.....	27.50
A. Fraser.....	27.50
M. Staley (Fahey).....	22.50
W. Kremer.....	22.50
A. S. Caskey.....	22.50

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S. B. Nilsen	22.50
A. G. Clarke.....	15.00
J. Kotcharin.....	25.00
C. Gibson.....	17.50
Hansen	25.00

Together with interest at six per cent per annum on each of said sums from the date of the filing of the libel herein.

It is further ordered, adjudged and decreed that said libelants recover herein their costs, to be taxed.

And it is further ordered, adjudged and decreed that, unless this decree be satisfied or an appeal be taken therefrom within the time limited by law and the rules of this court, the claimant and the stipulators for value and for costs on behalf of said steamer "Roanoke," or either thereof, do cause the engagements in said stipulations, and in each thereof, to be performed or show cause within four (4) days after the expiration of the time to appeal, or if that be not a day of jurisdiction then on the first succeeding day of jurisdiction, why execution should not issue against them, and against each thereof, their goods, chattels, land and tenements or other real estate.

Dated: October 9, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 9, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [228]

*In the District Court of the United States, Northern
District of California, First Division.*

IN ADMIRALTY.

OSKAR JOHANSEN et al.,

Libelants and Appellees,

vs.

The Steamer "ROANOKE," etc., NORTH PA-
CIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant and Appellant.

Notice of Appeal.

To the Clerk of the Above-entitled Court and to F.
R. Wall, Esq., Proctor for Libelants:

You and each of you are hereby notified that
claimant, North Pacific Steamship Company, a cor-
poration, hereby appeals to the United States Circuit
Court of Appeals for the 9th Circuit, from the final
decree in behalf of certain libelants herein, dated
October 9th, 1913, wherein it was ordered, adjudged
and decreed that such libelants recover certain sums
of money as and for salvage services, together with
interest thereon and costs of suit.

Dated: October 16, 1913.

CHARLES H. SOOY and

DAVID L. LEVY,

Proctors for Claimant and Appellant.

Due service and receipt of a copy of the above is
hereby admitted this — day of October, 1913.

_____ ,

Proctor for Libelants.

Served Oct. 16, 1913. R. W. K.

[Endorsed]: Filed Oct. 17, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [229]

*In the District Court of the United States, Northern
District of California, First Division.*

IN ADMIRALTY.

OSKAR JOHANSEN et al.,
Libelants and Appellees,
vs.

The Steamer "ROANOKE," etc., NORTH PA-
CIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant and Appellant.

Assignment of Errors.

NOW COMES North Pacific Steamship Company,
a corporation, claimant and appellant herein, and
assigns errors in the rulings, proceedings, orders, de-
cisions and decrees of said District Court herein as
follows, to wit:

1. That the Court erred in finding that the ser-
vices rendered by the crew of the "Santa Clara" to
the steamer "Roanoke" were salvage services.

2. That the Court erred in finding that the crew
of the "Santa Clara" rendered any services what-
ever to the steamer "Roanoke."

3. That the Court erred in finding that libelants
herein rendered salvage or any services whatever
to the steamer "Roanoke."

4. The Court erred in finding that there is due
each of the libelants herein as members of the crew

of the "Santa Clara" or any other capacity, for salvage services, or for any services, or otherwise, or at all, the sum set opposite the name of each libelant in the decree heretofore filed herein.

5. That the Court erred in finding that each of said sums of money, or any thereof, is a lien on the said steamer "Roanoke." [230]

6. The Court erred in decreeing that each of said libelants recover for salvage services said sum, or that salvage or any services whatever were performed, or that any recovery whatever should be had by any of said libelants for alleged salvage or any other service.

7. The Court erred in decreeing interest at 6% per annum, or any other interest on each of said sums from the date of the filing of the libel herein, or for any time, or at all.

8. The Court erred in decreeing that said libelants or any of them, should recover their costs.

9. That the Court erred in not making and entering a decree herein in favor of this claimant, dismissing the libel herein and releasing the steamer "Roanoke" from any liability whatever thereunder, or to libelants herein, or any of them.

Each and all of the above particulars were, are and are hereby assigned by claimant and appellant as errors.

WHEREFORE claimant and appellant prays the judgment of the United States Circuit Court of Appeals, 9th Circuit, in the premises, that the decree appealed from be reversed and that it recover its

costs herein incurred.

Dated: October 16, 1913.

CHARLES H. SOOY and
DAVID L. LEVY,

Proctors for Claimant and Appellant.

[Endorsed]: Filed Oct. 17, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [231]

*In the District Court of the United States, Northern
District of California, First Division.*

IN ADMIRALTY.

OSKAR JOHANSEN et al.,

Libelants and Appellees,

vs.

The Steamer "ROANOKE," etc., NORTH PA-
CIFIC STEAMSHIP COMPANY, a Corpora-
tion,

Claimant and Appellant.

Bond on Appeal for Costs and Staying Execution.

KNOW ALL MEN BY THESE PRESENTS:
That we, North Pacific Steamship Company, a cor-
poration organized and existing under and by virtue
of the laws of the State of California, as principal,
and Illinois Surety Company, a corporation organ-
ized and existing under and by virtue of the laws
of the State of Illinois, as surety, are held and firmly
bound unto A. Sjogren, J. E. Johnson, A. Disher,
Geo. M. Reed, G. W. Jacobs, Geo. K. Bekker, M.
Meislahn, P. Cain, F. G. Palmer, Christian Chris-
tensen, A. Johnsen, Oskar Johansen, A. C. Andersen,

E. Anderson, H. Andreason, J. Pitts, J. Martin, W. E. Pitts, E. Andrews, R. Tennant, B. Frankel, K. G. Clark, V. Matson, A. Fraser, M. Staley (Fahey), W. Kremer, A. S. Caskey, S. B. Nilsen, A. G. Clarke, J. Kotcharin, C. Gibson, Hansen, libelants in the above-entitled cause, in the sum of Two Hundred and Fifty Dollars (\$250.00), and in the further sum of Fifteen Hundred Dollars (\$1500.00), to be paid to the said libelants and their successors or assigns, for the payment of which sums, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, [232] successors, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of October, 1913.

WHEREAS, North Pacific Steamship Company, a corporation, as claimant of the steamer "Roanoke," has appealed to the United States Circuit Court of Appeals, for the 9th Circuit, from a decree of the District Court of the United States, for the Northern District of California, bearing date the 9th day of October, 1913, in a suit in which the parties above named as libelants were libelants against the steamer "Roanoke," her machinery, tackle, apparel, etc., and which decree orders that said Steamer "Roanoke," etc., and her stipulators, to pay said libelants the sum of \$887.50, with interest thereon at the rate of 6% per annum from the date of the filing of the libel, together with costs, and

WHEREAS said North Pacific Steamship Company, a corporation, desires during the progress of

said appeal to stay the execution of said decree of said District Court.

NOW, THEREFORE, the condition of this obligation is such that if the above-named appellant, North Pacific Steamship Company, a corporation, shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant, if the appeal is not sustained and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals of the 9th Circuit, in said cause, or on the mandate of said United States Circuit Court of Appeals, by the Court below, then this application shall be void; otherwise the same shall be and remain in full force and effect.

[233]

Executed in duplicate.

NORTH PACIFIC STEAMSHIP COMPANY,

By CHAS. P. DOE,

President.

By C. H. SOOY,

Asst. Secretary.

ILLINOIS SURETY COMPANY,

[Seal]

By HAROLD M. PARSONS,

Its Attorney in Fact.

The foregoing cost and supersedeas bond is hereby approved as to the form, amount and sufficiency of surety this 17th day of October, 1913.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Oct. 17, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [234]

**Certificate of Clerk [U. S. District Court] to
Transcript.**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed 234 pages, numbered from 1 to 234, inclusive, contain a full, true and correct Transcript of the records, as the same now appear on file and of record in the Clerk's Office of said District Court, in the cause entitled Oskar Johansen et al. vs. The Steamer "Roanoke," etc., and numbered 15,401, and which said Transcript of Appeal is made up pursuant to and in accordance with "Praecipe to Clerk" (copy of which is embodied in said transcript), and the instructions of Messrs. Charles H. Sooy and David L. Levy, Proctors for Appellants herein.

I further certify that the costs of preparing and certifying to the foregoing Transcript of Appeal is the sum of One Hundred Twenty-one Dollars and Seventy Cents (\$121.70), and that the said sum has been paid to me by proctors for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said District Court, this 13th day of December, A. D. 1913.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [235]

[Endorsed]: No. 2348. United States Circuit Court of Appeals for the Ninth Circuit. North Pacific Steamship Company, a Corporation, Claimant of the Steamer "Roanoke," Her Boilers, etc., Appellant, vs. A. Sjogren, J. E. Johnson, A. Disher, Geo. M. Reed, G. W. Jacobs, Geo. K. Bekker, M. Meislahn, P. Cain, F. G. Palmer, Christian Christensen, A. Johnson, Oskar Johansen, A. C. Andersen, E. Anderson, H. Andreason, J. Pitts, J. Martin, W. E. Pitts, E. Andrews, R. Tennant, B. Frankel, K. G. Clark, V. Matson, A. Fraser, M. Staley (Fahey), W. Kremer, A. S. Caskey, S. B. Nilsen, A. G. Clarke, J. Kotcharin, C. Gibson, ——— Hansen, Appellees. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed December 13, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 15,401.

OSKAR JOHANSEN et al.,

Libelants and Appellee,

vs.

The Steamer "ROANOKE," etc.,

Respondent and Appellant.

**Order Extending Time to Prepare and File
Transcript on Appeal.**

It appearing that the testimony taken in the above-entitled case has not been transcribed and filed in said case, and that said testimony is to be included in the Transcript of Appeal, herein: It is hereby ordered that the appellant herein have further time, to wit, thirty days from the date hereof, in which to file the said Transcript on Appeal, in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 17th, 1913.

M. T. DOOLING,

Judge.

[Endorsed]: No. 2348. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to December 18, 1913, to File Record Thereof and to Docket Case. Filed Nov. 16, 1913. F. D. Monckton, Clerk. Refiled Dec. 13, 1913. F. D. Monckton, Clerk.

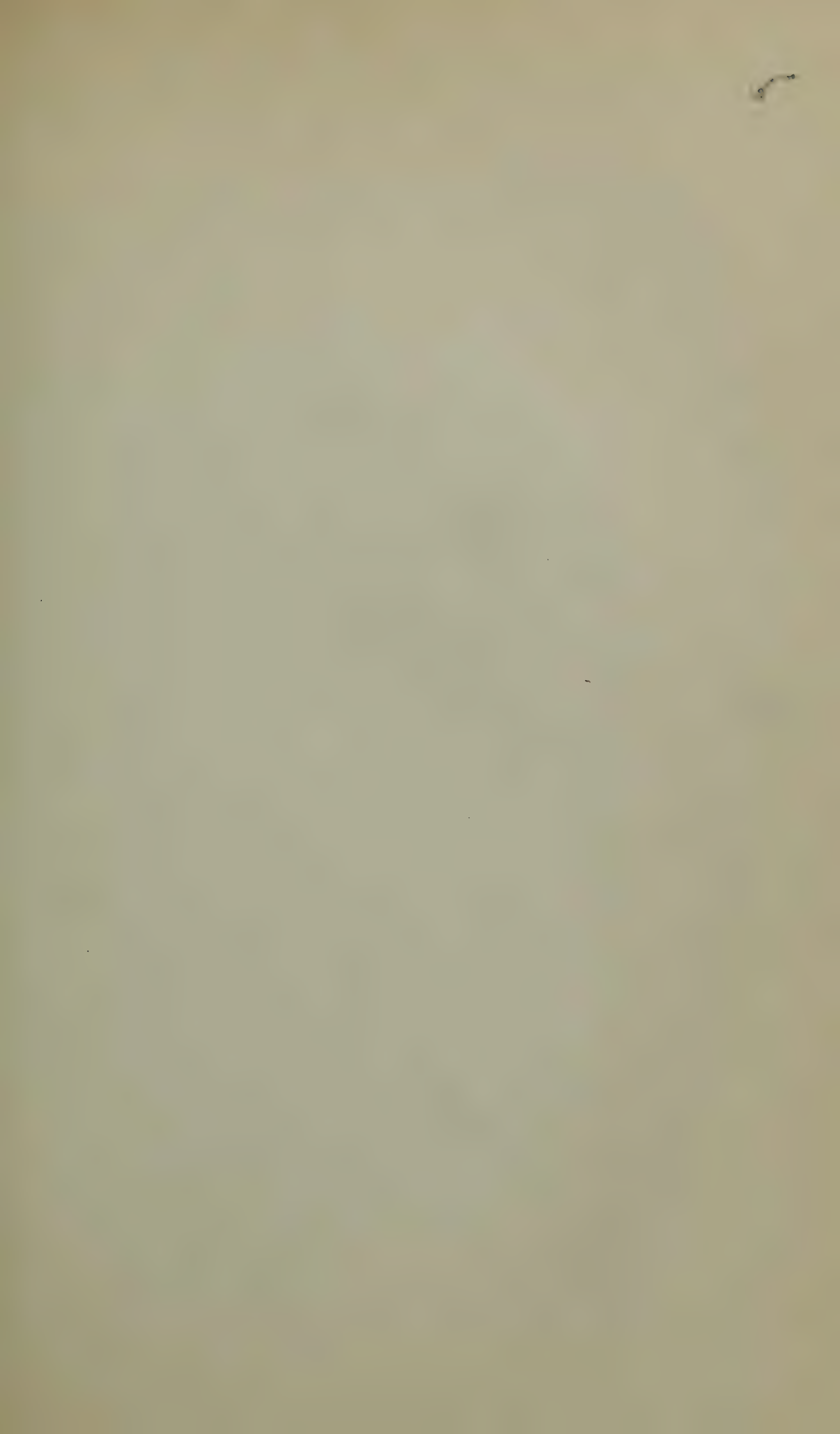


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No. 2348

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTH PACIFIC STEAMSHIP COMPANY (a corporation), Claimant of the Steamer "Roanoke", her boilers, etc.,

Appellant,

vs.

A. SJOGREN et al.,

Appellees.

BRIEF FOR APPELLANT.

1. Statement of the Case and Specification of Errors.

This was a libel for salvage by the officers and crew of the Santa Clara, excepting the master and chief engineer, against the steamer Roanoke. An amplification of the statement contained in the opinion of the District Judge (Apostles pp. 244-7) will serve to set forth the facts in the case. The quotation marks will disclose the parts taken therefrom:

"On April 10th, 1913, the steamer Roanoke bound from San Pedro to San Francisco, with 93

passengers and a cargo of freight lost her propeller when in the neighborhood of Point Arguello." The water was too deep to afford a safe anchorage and therefore her captain permitted her to drift in shore (p. 62) "from 10:05 A. M. until 11:10 A. M. when the anchor was dropped in 14½ fathoms of water at a point in the neighborhood of 1½ miles South by East of Point Arguello. There was no wind and the sea was calm with a light swell from the west. During the time that she remained so anchored, that is, until about 5:20 P. M., she was enveloped in a dense fog, and not more than a half mile to the eastward of the regular course of vessels plying along the coast. No rough weather was encountered during this period the sea remaining calm and there being no wind". The barometer was constant and the indications were of continued good weather (p. 60). Had any wind come up, its usual tendency at that period of the year, would have been to put the vessel further in shore (p. 59). "The anchor held without any apparent strain. The coast in that neighborhood is rocky in some places, and sandy in others. The steamer Santa Clara en route from San Francisco to Port Harford, about 10:45 A. M. received the following message from the Roanoke:

‘Capt. Jessen, S. S. Santa Clara,
Some to our assistance, lost wheel two miles
South Point Arguello.

DICKERSON.’

to which he replied about 10:55 A. M.:

‘Capt. Dickerson, S. S. Roanoke,
Your message received. Coming to your assistance.

JESSEN.’

After another interchange of messages concerning the probable time of the Santa Clara’s arrival at Point Arguello, her master, Captain Jessen, telegraphed to Chas. P. Doe, President of the Company which owned both vessels as follows:

“San Luis Obispo, Calif., April 10th, 1913.
Doe, Pier 13, San Francisco, Cal.

Do you want us to go to the assistance of
Roanoke takes five hours.

JESSEN.”

To this Doe replied:

“Jessen, Santa Clara.

Roanoke two miles south Arguello 10 A. M.
Broken shaft help him if necessary till tug
arrives.

DOE.”

In pursuance thereof Jessen again telegraphed to Dickson to ascertain whether the necessity which Doe had prescribed as the condition of Jessen’s aid to the Roanoke existed:

“We are full of freight and passengers; is
it absolutely necessary for us to go to your
assistance.”

and in reply received:

“We need your assistance at once.

DICKSON.”

(Apostles, pp. 67-72.)

If Jessen had not been so directed by his employer, he would not have gone to the assistance of the Roanoke (pp. 71-73).

“Upon receipt of the first message the Santa Clara altered her course” going out a point and a half in attendance upon further orders (p. 73). Then in compliance with them she “steamed directly for the Roanoke arriving there about 4:45 P. M. and took her in tow for San Luis where they arrived about 4 A. M., and where the Roanoke anchored about 6:45 A. M. outside the breakwater”.

The distance over which the tow extended was approximately thirty-two miles (p. 55). At this time the Santa Clara left the Roanoke and pursued her way (pp. 49-50). The Roanoke remained at anchor unattended, “until 11 A. M. when the tug Sea Rover, dispatched from San Francisco for that purpose, took her in tow and finally landed her at her dock at the latter place”.

Insofar as danger or safety of the vessel was concerned her position at anchor near Point Arguello and that near Port Harford were practically the same (p. 50). Both places were open roadsteads (p. 58) and the ocean beds were similar in character and anchorage facilities (pp. 82-3).

At this point in the statement, the District Judge has said that the Santa Clara “was always near enough to assist until the tug arrived”. The record contains nothing from which this fact may be in-

ferred, unless it be the testimony of Dickson taken before the commissioner:

“Q. Did you remain stationary or were you cruising back and forth? A. He was cruising back and forth with us.” (p. 236.)

But this has obvious reference to the time when both vessels waited until daylight so that the Roanoke could drop her anchor.

The observation of the District Judge is at variance with Dickson’s testimony given at the trial:

“Q. What time did the Santa Clara leave you? A. Between 5 and 6 in the morning to the best of my recollection.” (pp. 49-50.)

and to the question:

“Q. Where did you leave the Roanoke in relation to Port San Luis?”

Captain Jessen replied:

“A. Off the breakwater. I guess about the southeast end of the breakwater; it was foggy; I do not know exactly where.” (p. 90.)

The parts above quoted constitute a reproduction of the District Judge’s statement of facts in its entirety. The features of the case which are added to make the narrative complete disclose that in reaching his conclusions the District Judge omitted from consideration factors of plain and unquestionable import, the effect of which will be emphasized in the course of the argument.

Upon consideration of this evidence in which there is no substantial conflict, the District Judge

decided that the services rendered the Roanoke by the crew of the Santa Clara constituted salvage and awarded them the sum of \$887.50, with costs amounting to \$146.60. It is submitted that serious error was committed in that the service was clearly towage on account of which no remuneration can be given here; and further, even conceding it to have been salvage, it was of such a low order that the award was entirely too large.

2. The Service Was Towage.

In reaching this decision, the District Judge observed in reference to the calm sea and weather that on the Pacific Coast "in the month of April it is impossible to say how long such conditions would continue. A vessel so disabled as to be without motive power, within one and one-half miles of a rocky coast, may, if not relieved, reasonably apprehend danger. The telegrams of the master of the Roanoke would indicate that he believed that he was in need of assistance, and the circumstances were such as to render that belief very reasonable." The statement concerning local climatic conditions is open to serious question. The unusually mild character of the winter season was in April a matter of common knowledge and a subject of general comment among all residents. The presence of a thick fog and a calm sea made continued good weather morally certain. Every indication, including a steady barometer, pointed to this. Even should there have come a breeze of such violence

that the vessel's two anchors would have been caused to drag—which was most unlikely—at that time of the year it would have blown in such direction as to put the vessel further off shore. But the course of coastwise steamers was only a half mile to the west and the Roanoke had already picked up the steamer Willamette whose tow had not been sought, merely to avoid an obligation to pay for the towage which another of the company's vessels was able to render (pp. 235-6).

The observation of the District Judge that Dickson's telegrams indicated his belief that he needed assistance can have no force. Regardless of the messages it was plain that without assistance, either by way of tow or a new propeller, the Roanoke's voyage would even this day be uncompleted. This begging of the question should be avoided. It is an assumption of the very point in issue—that the assistance which the Roanoke needed and received was a salvage service as distinguished from towage.

What is there then in these facts that will justify the conclusion that the assistance rendered was salvage? What danger would a reasonable person apprehend? Capt. Dickson testified that there was no excitement on board his vessel (p. 53). Much point was made by the libelants upon the message in which he mentions his passengers, but this had obvious reference, as explained by the captain, to the inconvenience caused by the delay in the journey (pp. 239-40). There was in fact no circum-

stance in the course of the Santa Clara to Point Arguello, her meeting with the Roanoke, taking her line aboard and towing her to Port Harford, to characterize the case otherwise than as one of towage. What then was the legal basis of the contrary decision of the District Judge? One case is cited.

McConnochie v. Kerr, 9 Fed. 50,

and the following excerpt quoted from it:

“A salvage service is a service voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger.”

The applicability of this statement of law can best be tested by an inquiry into the salient facts there before the court.

The nearest safe anchorage of the Colon when injured was fifty-seven miles distant (p. 52); in the meantime, her captain testified, she was “at the mercy of the winds” (p. 52). The gales incident to that region were northers and hurricanes and a hurricane would have placed the ship in jeopardy (p. 53). That these facts make out a case far different from the one at bar is plain. Following the passage quoted by the District Judge is this statement:

“But if the evidence shows that the vessel was free from all circumstances of danger, present or apprehended; that ordinary towage

service, at ordinary rates could have been shortly obtained, so that salvage compensation could not be presumed to have been intended; and that the towage was rendered for no other purpose than to expedite the completion of the voyage—the service will be deemed to be a towage service only.”

Then is discussed a deciding factor of the case—the master of the assisting ship had gone back on his course and lost a day’s time, thus violating the vessel’s contract with all concerned. It was held:

“These were circumstances of danger, though not of immediate peril, which justified the Colon in asking help of the first vessel that appeared. They justified the captain of the Pomona, under his implied authority, to deviate for purposes of salvage, in departing from her own voyage to tow the Colon to a safe anchorage, and consequently entitled the Pomona and her crew to a moderate salvage compensation.” (p. 55.)

In the case at bar no such considerations moved the captain of the Santa Clara to go to the Roanoke’s assistance. His action was determined solely by the directions received from Mr. Doe.

The point under discussion has received careful consideration in two comparatively recent decisions in which the facts bear a striking resemblance to those before this Court. The conclusions reached are therefore of interest. They are

The J. C. Pfluger, 109 Fed. 93, and
The Robert S. Besnard, 144 Fed. 992.

In the latter, the *Besnard* while on a winter voyage from Montevideo to New York was struck by a water spout when 500 miles east of Charleston, losing part of her masts and retaining only six of her nineteen sails. She was able to make five or six knots an hour with favorable breezes but the wind becoming northerly she headed for the Port of Charleston. Her master made two or three unheeded requests for aid from passing vessels. He reached the vicinity of Charleston Light Ship that night and came to anchor four miles away. On the following morning libelant's tug went out and towed the vessel in. Pertinent excerpts from the case may here be quoted:

“While it is not claimed here that any bargain was actually made, that the service was to be considered a salvage service, and while the master denies that anything was said about his being in a position of danger, there is an implication from what took place that the master was put upon notice that something more than ordinary towage would be demanded, and the acceptance of the services of the tug in such conditions puts upon the vessel the burden of proving that nothing more than towage was required, and raises a presumption that it was in the nature of a salvage service, and the case has been considered by me in that aspect. * * * (p. 998.)

It seems that the circumstances of this case bring it within the qualification, and that the service rendered here was precisely the same and no other than that which would have been rendered if no damage or accident had happened to the bark.” (p. 999.)

After a full discussion of the case of *The Colon* (supra) it is held:

“If the vessel is in a position which requires towage service only, I do not apprehend that the mere fact that she had previously suffered injury changes the nature of the service, unless there are some circumstances of peril, immediate or reasonably to be apprehended, from which the vessel is relieved, or some hazard encountered, or unusual work done by the relieving vessel.” (p. 1002.)

The Pfluger left San Francisco, July 11th, 1900, bound for Queenstown. Next morning her main mast and mizzen top mast, fore-topsail and fore royal yard, were carried away by a whirlwind or squall of great violence. Her decks were injured to such extent that they leaked whenever a sea was shipped. The voyage was abandoned and with a few of her sails set the vessel made for Santa Barbara about two hundred miles distant. On the night of July 15th she reached a point in Santa Barbara Channel approximately twelve miles from port. Her signal lights, indicating that she was not under command, were seen by the Greenwood bound from Los Angeles to San Francisco. The latter made a slight deviation from her course for the purpose of meeting the Pfluger and rendering whatever assistance was necessary. The Pfluger's master requested a tow into port. The Greenwood passed a hawser to her and slowly towed her to an anchorage in the Port of Santa Barbara. This consumed about six hours' time and thereupon the

Greenwood resumed her voyage. It was held by Judge de Haven:

“Towing a vessel into a harbor may or may not be a salvage service. If the vessel towed was by this means aided in escaping from a present or prospective danger, the service will be regarded as one of salvage, and the towage as merely an incident. If, upon the other hand, the vessel thus assisted was not encompassed by any immediate or probable future peril, such service will be treated as one of towage merely and compensated as such.”
(p. 95.)

The case was held to be one of towage and the compensation awarded therefor was payable only to the owners of the Greenwood; further, that the master and crew performed only their ordinary duties for which they were employed on the vessel and were not entitled to share.

Such was the situation in the case at bar. To apply the term “salvage” to the service given by the Santa Clara is to travesty the meaning of the word.

3. Same. The Recent Act of Congress.

The act of Congress approved August 1, 1912, is, of course, controlling in this proceeding. Inasmuch as its meaning was drawn into question in the trial court and may here be a subject of contention on libelants' part, it is well to quote its pertinent sections:

“BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED.

That the right to remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services.

Sec. 2. That the master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding one thousand dollars or imprisonment for not exceeding two years, or both.

Sec. 3. That salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories."

It has been urged by the libelants that the act has worked a change in the well settled principles of the law of salvage by the use of the term "assistance"; that special remuneration is merited by reason of assistance of any kind, although it does not measure up to the requirements of a true case of salvage. There is no suggestion of such intention in the law. No new rights in this respect are created. Qualifications of rights which had long been established are discarded. The title makes the purpose clear: "To harmonize the national law of salvage"—thus abrogating such statutes as Section 2079, Civil Code of California—"with the provisions of the international convention for the unification of certain rules with respect to assistance and salvage at sea". The term "assistance"

is used as a synonym. Section 1 destroys the materiality of common ownership in regard to "the right to remuneration for assistance or salvage services". The nature of that right and the incidents giving rise to it are not affected.

The only other section asserted to be applicable here is section 3. The libelants have argued that they saved the lives of those aboard the Roanoke. But since this goes to the quantum of the award rather than to the question of salvage *vel non*, it will be considered in the following subdivision of this brief.

4. The Service Was Not Voluntary.

The definition of salvage quoted by the District Judge is:

"A salvage service is a service *voluntarily* rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended."

It is noticeable that in all the cases where salvage has been claimed, whether the service was so held or not, there has been one feature in common—the vessel lending aid has acted solely upon the inclination of her commander and with the unquestioned purpose of relieving another in distress. The conduct of the Santa Clara's captain stands out in strong contrast. No criticism is intended; it was obvious to him that the predicament of the Roanoke was not at all serious. To be sure, he answered

Dickson's call, threw his wheel over a point and a half and thus prepared for orders which might direct him to proceed past Port Harford. Upon his inquiry of Doe he was instructed to help the Roanoke if necessary. This in itself would be sufficient to take from the service rendered by the Santa Clara the voluntary character which is the *sine qua non* of salvage. But in further recognition of the triviality of the incident and the relative importance of the commercial necessities of the situation Captain Jessen asked the Roanoke's master whether his assistance was indispensable, stating that he had a full cargo and capacity number of passengers. He had no intention of passing Port Harford unless so directed (Ap. pp. 71, 73). The Roanoke's affirmative reply—its owner's mouthpiece—determined Captain Jessen's action. The error of the District Judge in deciding in favor of the salvage claim may be explained on one of two theories: He either ignored or failed to appreciate the significance of these wireless messages; it is noteworthy that they are not even mentioned in the opinion while others are quoted in full.

Suppose, then, that Captain Jessen were here asking for salvage award, could he satisfy a discerning court that in his conduct there was the essential ingredient of voluntary service? Inasmuch as he represents the complement of seamen aboard, their claim must be gauged by the same standard. The Santa Clara proceeded to Point Arguello under the express orders of its owner.

There was not a member of her crew who performed one act outside of the scope of his usual employment. There was no hardship, no danger undergone. The opinion of the District Judge so states and the record so conclusively establishes. There is no feature to distinguish the assistance given by the Santa Clara from that of the tug Sea Rover which was dispatched from San Francisco to complete the tow of the Roanoke to that port and whose service, even libelants concede, was mere towage; none—except perhaps that she was especially designed for that purpose, while to the Santa Clara it was an incident in her maritime career. But this was a material consideration only to the owner. The crew are employed to man the vessel and have no cause to complain because upon an occasion she is used to tow another where no peril or hardship is involved. The record shows that the Santa Clara's crew performed no service whatever (pp. 80-81). That rendered by the vessel herself was not voluntary. Therefore, there was no salvage.

5. The Amount of the Award Is Too Large.

But conceding for the purpose of this branch of the argument that the services of the Santa Clara was in the nature of salvage, her crew who have performed none but their usual functions are surely not entitled by the mere incident of their passive presence on board the vessel to the award decreed them. The decision here does violence to all the precedents. If salvage at all, it was salvage

of the very lowest order. An examination of similar cases will serve to demonstrate this contention.

The Alice Blanchard, 106 Fed. 238.

The steamer *Alice Blanchard* was discovered by the *Farallone* lying broadside to the swell, apparently disabled. She was fourteen miles north of Point Orford, and four or five miles off shore. The *Farallone* changed her course and upon meeting with the *Blanchard* found that she had met with an accident whereby a hole six by twelve inches had been stoved through her bow about six inches above the water line, thus admitting the entrance of water into her hold when under headway, and also when not under headway, whenever her bow dipped into the sea. The water was three or four feet deep in her engine room, but her fires were still burning. The master deemed it prudent to accept the *Farallone's* hawser and she was towed into Port Orford. This service consumed three hours and a half.

Substantial repairs were made there and after five hours' delay the *Farallone* towed her to San Francisco, the voyage covering forty-five hours. The delay caused to the *Farallone* by the accident was fourteen hours. The decree was for \$1000, one-quarter of which was awarded to the master and crew.

The Devonian, 150 Fed. 830.

The *Devonian* while on a voyage from Liverpool to Boston was driven from her course by a north-

easterly snowstorm and stranded at Scituate fifteen hundred feet from shore, receiving considerable injury from the buckling of her plates and floors. At low tide she rested on her bottom for full length and at high tide half length. She was valued, with her cargo, at \$800,000. On the following afternoon the tug *Patience*, valued at \$55,000, left Boston for the purpose of offering, and did offer, her services which were accepted. She pulled the *Devonian* off. The tug was absent from Boston in all five hours. An award of \$500 was made to the master and \$700 to the crew.

In both of these cases it is to be noted that the situation of the vessel assisted was much more serious than that of the *Roanoke*. Moreover, the service was purely voluntary. The value of the *Devonian* was over five times that of the *Roanoke*, yet the salving crew received less than in the case at bar.

The New Camelia, 105 Fed. 637.

Like the *Roanoke*, the *New Camelia* broke her shaft when about the middle of Lake Pontchartrain and was wholly disabled for further navigation. She was anchored and a boat sent to a port twelve miles distant for assistance. Shortly afterwards, a tug was sighted and the vessel was towed into port.

The District Judge had decreed \$1750, but on appeal it was held that \$60 would have been a proper award for both the salving vessel and her

crew, and a decree for the latter, in the sum of \$20 was directed.

The New Camelia was valued at \$35,000. The Roanoke is worth somewhat a little more than four times that amount. Upon the basis of this authority, the figure here should be \$80.

The Catalina, 105 Fed. 633.

The Catalina while in the Gulf of Mexico on her way to New Orleans, broke here propeller shaft beyond temporary repair. During the night, when about sixty miles from the mouth of the Mississippi River, she signaled the steamship Olympia for assistance. The latter towed the Catalina to a position of safety at South Pass, and thence resumed her voyage, having been delayed in all about twenty-four hours. The Catalina was valued at \$200,000. The District Judge had awarded \$6,000 salvage, one-third of which was to be distributed among the officers and crew of the Olympia. The Circuit Court of Appeals held that the Olympia was entitled to compensation of \$100.00 per hour, or \$24,000.00, of which \$800.00 was decreed in favor of the officers and crew.

Except for the fact that there was some room for the conclusion that the Catalina was in a perilous position, by reason of the great distance from port and her inability to find a safe anchorage, the case presents a striking analogy here. It is therefore interesting to calculate the matter of

compensation upon the basis of that awarded by the Court of Appeals in the Fifth Circuit.

The Santa Clara would have made Port Harford at about noon. Instead, she arrived there, with the Roanoke in tow the following morning at approximately 4 A. M. She was thus delayed eighteen hours. At \$100 an hour this would be \$1800 for the vessel and her crew. The value of the Roanoke is three-fourths that of the Catalina; three-fourths of \$1800 is \$1350, one-third of this—the proportion payable to the master and crew—is \$450. The salaries of the master and chief engineer of the Santa Clara total \$325 (p. 122). This is a little less than 15% of the sum of the wages of libelants added to that of these officers. The remaining 85% of \$450 is \$382.50. Such would be the award here when figured upon the basis of that in the Catalina.

The Monticello, 81 Fed. 211.

The Monticello's boiler broke down and she was disabled when from eight to fifteen miles from the coast. The wind was strong and a rough sea was running. After several unsuccessful attempts, a boat was lowered from the San Benito which had been attracted by the Monticello's signals of distress. A tow line was sent aboard the Monticello and she was then taken in tow and successfully brought to the Port of San Francisco. It was ebbtide and the San Benito lost in all twenty hours' time. Judge Morrow decreed her \$350 as

compensation which was to include damage done to a hawser and loss of a rope.

Another feature of plain import in this consideration is that in towing the Roanoke from Pt. Arguello to Port Harford, the Santa Clara did not take her to a place of safety. It was testified by Captain Dickson as libelants' witness (pp. 50, 58) that the situation at Port Harford was identical with that at Pt. Arguello. If there was any danger it was the same at both places. If it was salvage at all, it did not meet with success until the tow was completed at San Francisco where the Roanoke was docked. The alleged salvage did not end until then. Just as had the Santa Clara, the tug Sea Rover assisted the Roanoke upon the order of her owner, and towed her a distance of over two hundred miles. If it was salvage by one, it was salvage by both. And any award to the vessel or crew giving first aid must take into consideration the service of the second without which the essential element of salvage—success—would never have been present. The distance of the tow by the Santa Clara—thirty-five miles—suffers by comparison. That covered by the Sea Rover was six times as great. Because the Santa Clara was not regularly engaged in the towing business her remuneration should—all other things being equal—be twice that awarded a tug (see *The Catalina*, 105 Fed. 633, 6), thus reducing the comparative value of the service of the Sea Rover to three times that of the Santa Clara. The total

salvage award to the Santa Clara, computed on the basis of that decreed to the crew—at least one-third—would be \$2662.50. The tug should be entitled to three times that amount: \$7987.50, thus making the total salvage award for the assistance given the Roanoke the sum of \$10,650. It is sufficient to refer to the amount of the decrees in the cases above cited for comparison to demonstrate how completely the District Judge has misconceived the theory and mathematical basis of a salvage award.

6. Same. The Effect of the Recent Statute.

It has been contended that the clause in the recent Act of Congress:

“Sec. 3. That salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo and accessories.”

should effect an increase of the award. It is difficult to conceive upon what ground the contention that life was saved can be based. Even if there had been “a danger reasonably to be apprehended” it would not follow that the lives of those on board the Roanoke were saved. On the contrary, it is plain that their lives were not in the slightest peril. But conceding everything in favor of the libelants’ argument, the statute creates no right to remuneration for life salvage as such. No new claim against the ship or her owner is given. The law provides

that in a case of salvage, if others taking part save human life render no assistance to the vessel or cargo, and therefore under settled principles would receive no compensation, they are nevertheless entitled to a share in the award which the salvors of the vessel are given. A right to participate with the latter is created. Part of their remuneration is taken from them and given to the salvors of life. But taking part from the whole does not result in making the whole any greater. Therefore, the statute contains no warrant for a general increase in salvage awards even though lives as well as property have been saved.

7. Conclusion.

In conclusion, it is submitted that the decree of the District Court is erroneous and that the libel should be dismissed. The unhealthy effect of the decree if permitted to stand cannot be overestimated. It sets a dangerous precedent in shipping affairs on this coast. Vessels laboring under disability will refuse assistance of any kind for fear that the service may be held a salvage and their owners mulcted with large compensation. This question is now in this Court for the first time. The decision here will be the gauge by which all cases of similar character will be measured. The principles of maritime law as expounded by the authorities when applied to the facts at hand compel, it is submitted, a reversal of the decree.

CHARLES H. SOOY,

DAVID L. LEVY,

Proctors for Appellant.

No. 2348.

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NORTH PACIFIC STEAMSHIP
COMPANY, a Corporation, Claimant
of the Steamer "ROANOKE," Her
Boilers, etc.,

Appellant,

vs.

A. SJOGREN, et als.,

Appellees.

APPELLEES' BRIEF.

STATEMENT OF THE CASE.

The statement of the case, as presented by the appellant, is insufficient. The Apostles show that the facts are as follows:

On April 9, 1913, the S. S. "Santa Clara" left San Francisco, loaded with cargo and passengers, bound on a voyage thence to Port Harford, the port of San

Luis Obispo, California. In the forenoon of the next day, a little after ten o'clock, and while that vessel was within about an hour and a half's steaming of her port of destination, a wireless message was received by her from the S. S. "Roanoke," stating that the "Roanoke" was near Pt. Arguello with her propeller broken and that she was in need of assistance. The messages that were exchanged by wireless between the different persons connected with the services rendered and which show the nature of the services are set out in "libelant's exhibits" one (1) to eighteen (18) inclusive (in this court in the original), and in claimant's exhibits. The substance of the most material of these messages is as follows:

First. The master of the "Roanoke" (Dickson) informed the master of the "Santa Clara" (Jessen) that the "Roanoke" had lost her wheel two miles south of Point Arguello, and said, "Come to our assistance." To this Jessen answered: "Coming to your assistance." Thereafter Dickson asked Jessen, "When do you expect to arrive here?" And the answer was, "Expect to arrive in five hours. Off (i. e., I am now) Point Buchon." Then Jessen sent this very pertinent inquiry, "We are full of freight and passengers. Is it *absolutely necessary* for us to go to your assistance?" (Ap. 67). And Dickson's answer was, "*We need your assistance at once.*" And this entry was made in the "Roanoke's" logbook, "4:45 S. S. 'Santa Clara' arrived in response to wireless call" (Ap. 230).

Captain Jessen said, in answer to one of claimant's questions, that he had decided to go to the assistance of the "Roanoke" before he had any permission from the owners so to do; that when he got such permission he "was going there" (Ap. 70).

Upon receiving the first message, the "Santa Clara," instead of proceeding to her port of destination, changed her course and steamed directly for the "Roanoke," arriving off Point Arguello about 4:45 p. m. (Ap. 73-79). The "Santa Clara" on the way down met with fog, the first part was in patches, first thick and then clearing. During the latter half of the trip it shut down foggy, thick fog (Ap. 79).

After the "Santa Clara" reached the "Roanoke," she took the latter in tow for Port San Luis, where they both arrived about 4 a. m. the next day. The "Roanoke" anchored about 6:45 a. m. outside the San Luis breakwater, and remained there until taken in tow about 11 a. m. by the tug "Sea Rover," dispatched from San Francisco by the owner of the "Roanoke" for that purpose, and was by the tug towed to San Francisco and placed alongside the wharf there. The "Santa Clara" dropped the "Roanoke" at San Luis in obedience to the orders of the president of the claimant, but she was always near enough (at her destination, Port San Luis, a mile or a mile and a half from the "Roanoke") to assist the latter if needed (Ap. 57).

The "Roanoke," a steamer of 1654 net and 2354

gross tons, worth not less than \$150,000, loaded with cargo and passengers, bound from San Pedro to San Francisco, on the morning of April 10, 1914, about 10:05 a. m., while in from 17 to 20 fathoms of water and about three miles south by east of Point Arguello, in a thick fog, with a moderate swell setting from the westward to the eastward, with little or no wind, was disabled (Ap. 46-47). The extent of her injuries were as follows:

Her tail shaft was broken and two blades were knocked off of her propeller; the propeller "was pulled right up against the rudder-post, tight" (Ap. 225).

This large steamer had two sails, a jib and a main sail; but these were insufficient to give her steerage way. She was, therefore, entirely without motive power of any description, and either had to drift or anchor (Ap. 48). It was while she was without power of any kind and while drifting that she was sending out the appeals for help already set forth. In addition to sending out these appeals, one of the first things the master of the "Roanoke" did after the accident was to tell his wireless operator to find out what ships were around "in case we should need them." His operator thereafter reported to him that the "Santa Clara" had been picked up first and that the "Willamette" had also been picked up. Dickson then had the operator ask the "Willamette" to come around by him and to stay by him (Ap. 235-236).

From 10:05 a. m., when the tail shaft broke, until 11:10 a. m. the "Roanoke" drifted to a position about $1\frac{1}{2}$ miles S. by E. from Point Arguello and about one-half or three-quarters of a mile from the shore at the nearest point, and anchored in $14\frac{1}{2}$ fathoms of water, about half a mile inshore of the course of traffic (Ap. 239). The coast in the vicinity of Point Arguello, near where the "Roanoke" met with her accident and where she anchored is thus described by Palmer, his point of view being from about $1\frac{1}{2}$ miles out at sea (Ap. 173-175):

The mainland on which Point Arguello lighthouse stands sticks out from the rest of the coast about $\frac{1}{2}$ a mile; just outside of the lighthouse, on the seaside, there are four or five rocks that look (from $1\frac{1}{2}$ miles away) to be about six or eight feet square. Right south of the lighthouse are more rocks that seem to be a little bigger. Then from the lighthouse and in a southeasterly direction across the Bay to the coast there is a bit of rocky beach, about half a mile; then there is a rocky point, about 40 or 50 feet high, with rocks at the foot, just where the period is put after the word "Pt." on the words "Rocky Point" on the chart; from the figure "5" above the letters "Pt." in the words "Rocky Pt." on the chart to the north eastward the condition of the beach is the same as that between Pt. Arguello and the coast to the north-east of the figure "5"; below Rocky Pt. the beach is stony, stones as big as your hand, and on the beach are

little rocks right along, most of them not visible except at low water.

Captain Gunderson, who was not connected in any way with the litigation, and who as a master of vessels has passed up and down that part of the coast 400 or 500 times, says that the vicinity in which the "Roanoke" was anchored is considered by him to be "one of the most dangerous parts of the Pacific Coast" (Ap. 36). He also says that he considers that a vessel anchored where the "Roanoke" was anchored at the time she was there anchored, and in circumstances similar to those in which she was anchored, "is in a dangerous position." Also, his experience is that swells in that locality sometimes spring up "pretty rapidly" (Ap. 37). This experienced witness also stated, "It is dangerous anywhere (along the coast) if you lose your propeller or shaft. You are in a bad fix as well as any other place" (Ap. 43).

And on cross-examination, claimant brought this out of witness Palmer: "Sometimes those ground swells are very heavy, are they not? A. They are very heavy" (Ap. 186).

The fog, as the "Santa Clara" neared the "Roanoke," was so thick that the "Roanoke" could not be seen until the "Santa Clara" was within 100 or 150 feet of her. In approaching the "Roanoke," the "Santa Clara" was misled by the "Roanoke's" whistle into believing the vessel whistling to be a tug ahead, and but for the promptness of the man at the helm of the

“Santa Clara” in shifting the wheel, the “Santa Clara” would have collided with the “Roanoke” because of the fog (Ap. 176, 177, 183, 184).

There was no difficulty encountered in taking the “Roanoke” in tow, nor was the operation attended with any other danger than the one just mentioned, and we so stated time and again in the trial court. The “Santa Clara” had no apparatus whatsoever on board for towing, nor was she in any wise fitted for towing. She had to take the hawser of the “Roanoke” (Ap. 80).

Both vessels belonged to the claimant.

ARGUMENT.

The Services Rendered Were so Clearly Salvage Services That Damages Should Be Assessed to Appellant, Under Subdivision 4 of General Rule 30.

Appellees were compelled to make their case almost entirely from the testimony of the claimant's own witnesses. Every witness called by the claimant was also called by appellees. All of claimant's witnesses were examined and cross-examined in open court. The trial court had the fullest opportunity to ascertain from the testimony and from the bearing of the master of the “Roanoke” whether the latter believed he was in need of assistance. The Court determined that he did so believe, and, of course, even ordinarily, this Court would not disturb that finding, unless it was clearly

contrary to the evidence. But here is a case where the law is well established and where there is no possibility of throwing the slightest shadow of a doubt upon the findings of fact. These facts, summed up, are:

A steam vessel of more than 2000 gross tons, with 90 odd passengers on board, was adrift in a thick fog in the month of April, without motive power, within three miles of a rocky coast near one of the most dangerous points on the Pacific Coast, where heavy swells or winds may spring up at any time. Her captain implored aid of the "Santa Clara," for there is no other construction to be put upon his answering Captain Jessen's message, "We are full of freight and passengers. Is it absolutely necessary for us to go to your assistance," with the prompt response, "We need your assistance at once."

Also, the course of the "Santa Clara" was changed to head for the "Roanoke" as soon as the first call for assistance was received, and was not thereafter changed. And that was as it should have been, and the way it should always be in like cases. And owners on shore have no business to try to substitute their judgment for the master's. When the wireless operator at sea catches a cry for assistance the officers and crew of his vessel should go at once; not stand upon the order of their going, debating whether or not the owner of the vessel in distress, when the benefits are forgot, will try to prove to an admiralty court that there was no need for the assistance. The an-

swer of this Court must, it seems to us, always be in the shape of a liberal reward to those who give their aid at once, without a moment's hesitation, and also commendation for having acted promptly and in having construed the messages as meaning what they said.

THE LAW.

That the law is well-settled appears from what this Court said in the case of the "*Flottbek*," 118 Fed., 960:

"There is a marked and clear distinction between a towage and a salvage service. When a tug is called or taken by a sound vessel as a mere means of saving time, or from considerations of convenience, the service is classed as towage; but if the vessel is disabled, and in need of assistance, it is a salvage service. In cases of simple towage, only a reasonable compensation is allowed, as upon a *quantum meruit*. In case of salvage, the award is upon a broader and more liberal scale, as we have before stated. In *McConnachie vs. Kerr* (D. C.), 9 Fed., 50, 53, Judge Brown said:

"A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger.' "

Of course no other authority is necessary; but we give a few other cases similar to the one at bar. They are:

“Any service or assistance applied for or received by a vessel in peril or distress which in any measure conduces to its safety is in the nature of salvage service, and is to be compensated upon principles more liberal than ordinary work. . . . It is none the less a salvage service that the peril apprehended did not befall, or that the labor expended was insignificant, and performed without actual risk. These considerations affect the *quantum* of compensation, but not the nature of the service, or the principles by which the compensation is to be measured.” “*The Apache*,” 124 Fed., pp. 907-908.

“Towing a disabled vessel on the high seas is always a salvage service. . . . In the act of making preparations for towing and being towed, ships out at sea are very liable to collisions, to the fouling of hawsers, to the smashing of small boats, to losing anchors, and to other serious accidents. After getting under way, and commencing the towing service, there is constant danger on the open sea, when the disabled ship has no power of self-control. The hawsers are made as long as practicable, often 70 fathoms or more, in order to keep the vessels far apart. During the towing, the varying conditions of wind and wave are fruitful of casualties.

“The Great Northern’s motive power was entirely disabled; her propeller useless, and bearing up against her rudder; she was without yards or square sails; and she had only a fore and aft rigging, which was not sufficient to give her steerage way. She was in ballast, and liable to plunge and to sheer *ad libitum*. She did sheer much during the towing, and brought injurious straining upon the engines of the ‘Sagamore.’ The latter ship was in constant danger of her propeller fouling with

the towing hawser. This vessel had \$237,000 of values at risk, and brought the 'Great Northern,' worth \$100,000, safely to port. Fortunately for both ships, the weather and sea proved favorable after the towage was commenced. This last fact seems to be relied upon by the respondents as a reason for diminishing the amount which might otherwise be awarded to the salvors. Sufficient has been said to show that this principle does not hold good in admiralty. The good fortune of better weather and a quieter sea, which occurred during the course of the towing service, inured alike to both ships, and does not entitle the salved ship to claim the benefit of it, to the injury of the salving vessel." *"The Great Northern,"* 72 Fed., pp. 681-683.

"At the trial the master and officers of the 'Gallego,' in contradiction of their protest, declared that they never supposed the 'Gallego' to be in any danger. It is easy after the event to deny fear; but, if it be true that this steamer was under command of a master unable to see any peril in the condition of his ship as she was when the 'Lone Star' came to her aid, that circumstance, in my opinion, would enhance the peril of the ship. The acts of the master at the time speak louder than his subsequent words, and show knowledge that the position of his ship was one of peril. Of course, it can be said that, being sound save in respect to her rudder, the 'Gallego,' for a time more or less extended, as the chance of favorable winds and of being fallen in with by some other vessel not only willing but able to aid her might have favored, would have floated; but, such chance not favoring her, destruction in the end was to be expected, for she was upon the sea without the knowledge and ability necessary to enable her, unassisted, to reach

a port of safety." *"The Gallego,"* 30 Fed., 273-274.

"If the assistance of a salvor is sought and if his assistance is received, it is not competent for those who have asked and received that assistance to insist that by their own resources they could have saved themselves." *"The Huntsville,"* Fed. Cas. No. 6916, page 1005.

"If the vessel is in a situation of actual apprehension, though not in actual danger, and the assistance of the salvors is requested by and rendered to the persons in charge of the vessel, they cannot plead that they are not bound to pay for the services rendered on the ground that the vessel would have been saved if left in her former position. 2 *Pars. Shipp. & Adm.*, 283." *"The Jewell,"* 41 Fed., 104.

"The taking in tow of a disabled vessel on the open sea by a tug is always a salvage service." *"The Lottie E. Hopkins,"* 133 Fed., 405.

"Assisting a vessel 'in the situation of actual apprehension, though not of actual danger,' is salvage. *'The Raikes,* 1 Hagg., 247; *'The Phantom,'* L. R. 1 Adm., 58; *'The Joseph C. Griggs,'* 1 Ben. 81, Fed. Cas. No. 6,640. 'The degree of danger is immaterial in considering the nature of the service.' *'The Westminster,'* 1 W. Rob., 232." *"The Lowther Castle,"* 195 Fed., 605.

"The extent of the risk assumed in undertaking to tow a disabled vessel is not to be gauged by the results alone; and the fact that the towing line was speedily taken, and that no mishap occurred, is entitled to consideration only so far as it tends to

show the state of the wind and sea." *"The Waverly,"* 78 Fed., 191.

"The valuable services were rendered by the ship and her machinery, the master and crew doing only their ordinary duty, for which they were paid by the owners, and yet on principles of salvage the men must receive a share of the reward. No amount of reward to owner and machinery will so stimulate and encourage efforts to save life and property in peril on the high seas as will moderate rewards to master and crew and who are on hand to control ship and machinery, and are the effective agents to set the machinery in motion." Judge Pardee in the *"New Orleans,"* 23 Fed., 911.

"Where salvage services which occupied less than a day are of the lowest order, and the crew of the tugs perform only services in the ordinary course of employment, the award to them should not be more than two months' pay each." *Ulster S. S. Co. vs. Cape Fear Towing & Transportation Co.,* 94 Fed., 214.

The cases cited by appellant, as to what are salvage services, are not in any way applicable to the case at bar. They are of two entirely different kinds: One where the vessel rendering the assistance was regularly engaged in the business of towing; the other where the vessel assisted retained sufficient motive power to be able to navigate. In the case of *"The Besnard"* the vessel was well able to navigate and also the assistance was rendered by a tug.

In this case, the "Santa Clara" was a freight and passenger vessel. She was not engaged in the business

of towing, and in fact had no towing facilities whatsoever. She had to take and use the "Roanoke's" hawser. Also, the "Roanoke" was entirely deprived of motive power. She had absolutely no means of proceeding.

With great respect for the memory of the able judge who decided the case of the "Pfluger," we submit that that case was erroneously decided upon both points passed upon.

Although the "Pfluger" was *not* entirely deprived of motive power, we submit that the facts stated in the opinion show that the services rendered her were salvage services. As to the other point, neither the aiding vessel nor her crew were engaged in the business of towing; therefore, the crew owed no duty to the "Pfluger," and should have been compensated for the assistance rendered, whether that assistance was salvage service or not. The reason is obvious. The seaman's contract is with his own ship. He owes a particularly rigorous duty to that ship, but to no other ship. He must not fail in obedience to orders, so far as his own ship is concerned; but he can not lawfully be compelled to perform labor for the benefit of another vessel, except where that is the regular business in which his own vessel is engaged. If he aids such other vessel, he is entitled to compensation therefor.

Williamson vs. "The Alphonso," Fed. Cas.
No. 17,749.

However, the argument is merely for the purpose of showing the reasons why the "Pfluger" was incorrectly decided; for, as far as the case at bar is concerned, the question is put at rest by the act of the 62nd Congress, 2nd Session, Chap. 268, approved Aug. 1, 1912, effective July 1, 1912, and the pertinent parts of which read as follows:

"An act to harmonize the national law of salvage with the provisions of the international convention for the unification of certain rules with respect to assistance *and* salvage at sea, and for other purposes.

Sec. 1. "That the right to remuneration for assistance *or* salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage."

Counsel for appellant fall into the error of supposing that this law has made some change in the settled principles of the law of salvage, and that we have so urged. We have never urged anything of the kind. The law is merely a statutory declaration of what was before well-settled principles of the law of salvage in this country. We have long been familiar with the well-settled principle, enforced by the Courts, before the above statutory declaration, that common ownership was no bar to recovery of compensation by the crew of the salving vessel (*Lewis vs. A Lot of Whalebone*, 51 Fed., 924; *Gilchrist, etc., Co. vs. 110,000 Bushels of Wheat*, 120 Fed., 434; *Rees vs. U. S.*, 134 Fed., 146). The same is true as to assistance ren-

dered to another vessel. The statute only declares the general principles and applies it to the case of common ownership. Sec. 2079 of the Civil Code of California has always been an absolute nullity, as far as any proceeding *in rem* for salvage is concerned (*"The Queen,"* C. C. A., 9th Cir., 94 Fed., 188, and cases cited).

Of course it can not be seriously contended that "assistance" and "salvage" are used as synonyms in the statute, where the two words are both conjunctively and disjunctively united.

AMOUNT OF AWARD.

The amount of the award was, if anything, too small, but the district court, in the exercise of a sound discretion, decided that the compensation to each of the crew should be half a month's pay. This amount is a subject peculiarly within the discretion of the trial court in admiralty, and will not be disturbed except in a very clear case of mistake.

"In the present case, the District Court have awarded one-half of the prize proceeds, or salvage, to the captors. It was an exercise of sound discretion; and this court would, with extreme reluctance, interfere with that discretion, unless in a very clear case of mistake." *"The Dos Hermanos,"* 10 Wheat., 310.

"If I were to reverse the decree of the district court in this case, I do not perceive any solid distinction, on which I could rest it. It was an exer-

cise of discretion, which violated no principle, and does not seem to have assumed any extraordinary latitude. It is best for all parties, that litigation of this nature should be speedily settled; and when I can not perceive an undue inflammation of the rate of salvage, I do not think, that, sitting in an appellate court, I should nicely balance the subordinate distinctions of cases, whose complexions carry a plain merit and humane interposition." Judge Story in "*The Panama*," Fed. Cas., 14,319, p. 490.

As to the amount of costs, which is called to the attention of the Court, we wish to say there should have been no costs in this case. It should never have been allowed to go into court. We wish to say further that a large part of the costs were made necessary by claimant's methods of examination (see particularly Ap., pp. 127-221) and because of the course adopted by claimant to compel proof of the fact, which should have been admitted, that libelants were part of the crew of the "Santa Clara." Both vessels were owned by the same owner. The answer, sworn to by claimant's president, denied on information and belief, that many of those named in the libel were seamen or part of the crew of a vessel owned by claimant on April 10th. After exceptions to the answer had been sustained and *after* testimony had been taken as to the presence of some of these very same libelants on board (*which testimony was given by claimant's own president*, in the presence of claimant's counsel), an amended answer was filed, which was sworn to by claimant's assistant secretary (who is also one of claim-

ant's counsel) and which sworn amendment *denied positively* the presence on board of the persons referred to. This recital, without comment, shows claimant's attitude toward facts which good faith required it to admit.

THE EFFECT OF THE RECENT STATUTE.

The reasons for the award are stated at length by the trial court in its opinion. There is no mention therein of the recent statute nor any suggestion that it was in any way considered by the trial judge in reaching his conclusion as to the amount of the award. Very much the contrary. It is as plain as a pikestaff from that opinion, that the trial judge did not consider that life salvage was in any way a factor in this case. Further, counsel for appellant knows perfectly well that we never have contended that there were any lives in immediate danger on the "Roanoke." What we suggested to the trial court upon this point, and which that court ignored, was in these words:

"We do not wish to have it thought that we are now claiming that the libelants saved the lives of any of the many persons on board of the 'Roanoke' from any *immediate* or *absolute* danger from the time that the 'Roanoke' anchored until the 'Santa Clara' dropped her off Port Harford. Our contention is this:

"What constitutes a salvage service as to property also constitutes a salvage service as to life, if there be living persons on board of the property to which the salvage service is rendered.

"As it is plain to us the officers and crew of the

'Santa Clara' voluntarily rendered assistance to a vessel needing it and relieved her from danger and distress and from situations from which danger was to be and was reasonably apprehended, so these services were, as to the property, salvage services; and, therefore, must necessarily be salvage services as to the living persons on the 'Roanoke'." (*"The Flottbek,"* 118 Fed., 960, and *"The Plymouth Rock,"* 9 Fed., 416-418).

CONCLUSION.

Claimant would have this court believe that if Captain Jessen had not received orders from his owners, he would not have gone to the assistance of the "Roanoke." In other words, claimant would have this court believe that a master in its employ, when he receives urgent appeals for help, would deliberately take the chance of violating section 2 of the recent statute. For, of course, it was not "obvious" to Captain Jessen that "the predicament of the 'Roanoke' was not at all serious." How could it be, when he had asked Dickson if assistance was *absolutely* necessary and had by him been told, "We need your assistance at once"? He knew this by wireless. Wireless has utilized a newly-discovered law of nature, but claimant has developed a sixth sense in a master that enables him to know what is not so. It is even directly contrary to Captain Jessen's own testimony (Ap., 70, 73-79).

With such a foundation, claimant argues that when Jessen went, he went in obedience to orders from his owner. While this is opposed to the fact, claimant

should be ashamed to present such an argument. After the terrible lesson of the "Santa Rosa," owners should have learned that it is their duty not to interfere in any way with the master of a vessel at sea in the exercise of his own judgment. He is put there to exercise that very judgment. The owner's duty is to give the master all of the information possible, and then say to that master: "Act as your best judgment tells you."

While Jessen went to the assistance of the "Roanoke" in response to her calls for aid, what difference would it make, as far as the libelants are concerned, if he had gone only in response to orders from his owner? None; for the libelants owed no duty to the "Roanoke." And, further, claimant asks the court to find a means for evading the plain letter of the statute. Suppose the master of a vessel hears the cry of another vessel in dire distress. Both vessels belong to the same owner. The owner gets this same information, and sends orders to the first vessel to proceed to the assistance of the other. The owner afterwards comes into court and says the case falls within the law in every other respect; but it was not salvage, because he ordered his master to the scene. How long would it be before every owner would send out such orders instantly upon every such occasion, or else give standing orders to every one of their masters? Such a plea as claimant advances should get short shrift in the admiralty.

We respectfully submit the decree should be affirmed, with damages under Rule 30.

Respectfully submitted.

W. A. E.

Proctor for Libelants.

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. H. PETERSON,
Petitioner and Appellant,
vs.

R. L. SABIN, as Trustee of the Estate of the ROHR-
BACHER AUTOMATIC AIR PUMP COM-
PANY, a Corporation, Bankrupt,
Respondent and Appellee.

In the Matter of ROHRBACHER AUTOMATIC
AIR PUMP COMPANY, Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order and Judgment of
the United States District Court
for the District of Oregon,
and

Transcript of Record

Upon Appeal from the United States District Court for
the District of Oregon.

FILED

FEB 3 - 1914

No. 2354

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. H. PETERSON,
Petitioner and Appellant,
vs.

R. L. SABIN, as Trustee of the Estate of the ROHR-
BACHER AUTOMATIC AIR PUMP COM-
PANY, a Corporation, Bankrupt,
Respondent and Appellee.

In the Matter of ROHRBACHER AUTOMATIC
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

IN BANKRUPTCY—No. 2522.

In the Matter of ROHRBACHER AUTOMATIC
AIR PUMP COMPANY,

Bankrupt.

Petition for Revision.

To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now J. H. Peterson and complaining of the
order and judgment made and rendered on December
15th, 1913, against this complainant by the Hon.
Chas. E. Wolverton, Judge of the District Court of
the United States for the District of Oregon, says:

That he is a creditor in the sum of three thousand
dollars (\$3,000) of Rohrbacher Automatic Air Pump
Company, bankrupt.

On September 11th, 1913, Rohrbacher Automatic
Air Pump Company was adjudged a bankrupt by
the District Court of the United States for the Dis-
trict of Oregon, and the cause referred to Chester
G. Murphy, Esq., one of the referees in bankruptcy
for and within said district. On the 22d day of
October, 1913, J. H. Peterson filed with said ref-
eree his duly verified proof of claim as a secured
creditor, stating therein that his debt was secured
by a chattel mortgage executed and delivered to com-
plainant by the bankrupt on or about October 29,
1912, and covering all the property owned by the
mortgagor and consisting of machinery, tools, equip-
ment, supplies, office furniture and fittings and safe.

The fact and the amount of the debt were admitted by the trustee, but objection was made by him to the allowance thereof as a secured [1*] claim on the ground that the mortgage was void *in toto*.

The matter having been submitted to the referee, upon a stipulated statement of facts, a copy of which is hereto attached and marked Exhibit "A," the referee, on November 13, 1913, held the mortgage void *in toto* and disallowed petitioner's claim as a secured creditor with leave to petitioner, however, to file a claim as an unsecured creditor.

On December 12, 1913, upon petition of J. H. Peterson, this cause came on for hearing before said Judge to review the proceedings and final order of said referee made and based upon said agreed statement of facts. Upon the proof of claim filed by petitioner and upon the agreed statement of facts, your petitioner contended in said District Court, and he now contends in this court:

First: That upon the facts set forth in said agreed statement of facts, the machinery, tools, equipment, office furniture and fitting and safe passed into the hands of the trustee in bankruptcy charged with a lien in favor of petitioner by virtue of said chattel mortgage.

Secondly: That by the laws of the State of Oregon a chattel mortgage is not void *in toto* as to creditors of the mortgagor, though void as to a portion of the property which the mortgage purports to cover, because as to that property the right of possession, to sell the same and to use the proceeds as the mort-

*Page-number appearing at foot of page of original Petition for Revision.

gagor saw fit, is either impliedly reserved or granted to the mortgagor, either in the mortgage or by subsequent collateral agreement between the parties.

[2]

Thirdly: That the mortgage held by petitioner, though void as to creditors of the bankrupt in so far as it purports to cover "supplies," is nevertheless valid as to the machinery, tools, equipment, office furniture and fittings and safe.

Fourth: That petitioner is entitled to prove his claim as a secured creditor and that his claim should be allowed as a secured creditor because of the mortgage set forth in said stipulated statement of facts.

On December 15th, 1913, said Judge rendered an opinion in this cause holding petitioner's mortgage void *in toto*, and there was made and entered in said District Court and in this cause an order and judgment, a copy of which is hereto annexed and marked Exhibit "B," disallowing petitioner's claim as a secured creditor and affirming in all respects the final order of said referee.

That said order of the District Court was erroneous in matter of law because: First, it declares petitioner's said mortgage void *in toto* as to creditors of the mortgagor; secondly, it fails to declare said mortgage of petitioner valid as to the property mentioned therein and as to which no power of sale with a right to the proceeds was reserved or granted to the mortgagor; thirdly, it disallows petitioner's claim as a secured creditor against the bankrupt; fourth, it affirms the order of the referee disallowing peti-

tioner's claim as a secured creditor against said bankrupt.

Wherefore, your petitioner, feeling aggrieved because of such order and judgment, asks that the same may be revised, in matter of law by your Honorable Court, as provided in section 24b of the bankruptcy law of 1898, and the rules and practice of in such cases provided.

J. H. PETERSON,
Petitioner. [3]

State of Oregon,
County of Multnomah,—ss.

I, J. H. Peterson, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of facts therein contained are true according to the best of my knowledge, information and belief.

[Seal]

J. H. PETERSON.

Subscribed and sworn to before me this 23 day of December, 1913.

M. M. MATTHIESSEN,
Notary Public for Oregon. [4]

[Admission of Service of Petition for Revision.]

Due service of the within petition for revision by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, December 23, 1913.

SIDNEY TEISER,
Attorney for R. L. Sabin,
Trustee of the Estate of Rohrbacher Automatic Air
Pump Company, a Corporation, Bankrupt.

[Endorsed]: Petition for Revision. Filed Dec.
26, 1913.

**[Order Allowing Petitioner to January 25, 1914, to
File Certified Transcript of Proceedings in
U. S. Circuit Court of Appeals for Use upon
Petitioner's Petition for Revision.]**

[Title of Court and Matter.]

For sufficient cause shown, it is hereby ordered that the petitioner herein have to and including the 25th day of January, 1914, in which to file in the office of the clerk of this court a certified transcript of the proceedings had in this cause in the District Court of the United States for the District of Oregon for the use of this court upon the petitioner's petition for a revision of order and judgment of said District Court made and entered on the 15th day of December, 1913.

Dated this 26th day of December, 1913.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: No. 2354. In the United States Circuit Court of Appeals for the Ninth Circuit. Order Extending Time. Filed Dec. 29, 1913. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. H. PETERSON,

Appellant,

vs.

R. L. SABIN, as Trustee of the Estate of the ROHR-
BACHER AUTOMATIC AIR PUMP COM-
PANY, a Corporation, Bankrupt,

Appellee.

In the Matter of ROHRBACHER AUTOMATIC
AIR PUMP COMPANY, Bankrupt.

Transcript of Record

Upon Appeal from the United States District Court for
the District of Oregon.

[Creditor's Proof of Claim and Letter of Attorney.]

*In the District Court of the United States for the
District of Oregon.*

IN BANKRUPTCY.

**In the Matter of ROHRBACHER AUTOMATIC
AIR PUMP COMPANY, a Corporation,
Bankrupt.**

At Portland, in said District of Oregon, on the 8th day of October, A. D., 1913, came J. H. Peterson, of Portland, in the county of Multnomah, in said District of Oregon, and made oath, and says that the Rohrbacher Automatic Air Pump Company, a corporation, the person by whom a petition for adjudication of bankruptcy has been filed, was at, and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of \$3,000, with interest thereon at the rate of eight per cent per annum from October 29, 1912; that the consideration of said debt is as follows, to wit, the sum of \$3,000 advanced by deponent to said Rohrbacher Automatic Air Pump Company on or about October 29, 1912, which indebtedness is evidenced by a note in words and figures as follows, to wit:

“3000.00. Portland, Oregon, October 29, 1912.

Six months after date, without grace, ROHRBACHER AUTOMATIC AIR PUMP COMPANY, promises to pay to the order of J. H. PETERSON, at United States National Bank, at

Portland, Oregon, Three Thousand Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin, at the rate of eight per cent per annum from date until paid, for value received. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, Rohrbacher Automatic Air Pump Company promises and agrees to pay in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

[Corporate Seal]

ROHRBACHER AUTOMATIC AIR PUMP
COMPANY,

By M. A. HETRICK,

Secretary." [1*]

And the original thereof is hereto attached and made a part hereof. That no part of said debt has been paid; that there are no setoffs or counterclaims to the same, and that the only securities held by this deponent for said debt are the following: A chattel mortgage dated October 29, 1912, and executed and delivered by said Rohrbacher Automatic Air Pump Company to deponent, wherein and whereby said Rohrbacher Automatic Air Pump Company granted, bargained, sold, assigned and con-

*Page-number appearing at foot of page of original certified Record on Appeal.

veyed to deponent, certain goods and chattels then, ever since, and now being located on the premises known as No. 173 East Water Street, in the city of Portland, Multnomah County, Oregon, being all of the property owned by said mortgagor, and consisting of machinery, tools, equipment, supplies, office furniture, fittings and safe, and also the goodwill of the business conducted by said bankrupt and any and all patents owned by it and its contracts and royalties; but affiant does not hereby intend *to or* waive any security he has for this debt.

(Sd.) J. H. PETERSON,
Creditor.

Subscribed and sworn to before me this 8th day of October, 1913.

[Seal] (Sd.) M. M. MATTHIESSEN,
Notary Public for Oregon. [2]

[Letter of Attorney.]

[Title of Court and Matter.]

To M. M. Matthiessen:

I, J. H. Peterson, of Portland, in the County of Multnomah and State of Oregon, do hereby authorize you, or any of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter or at such other place and time as may be appointed by the Court for the holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then

and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other [3] purpose in my interest whatsoever, with full power of substitution.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed my seal the 8th day of October, A. D. 1913.

(Sd.) J. H. PETERSON.

Signed, sealed and delivered in the presence of

.....

Acknowledged before me this 7th day of Oct., A. D. 1913.

[Seal]

(Sd.) P. P. DABNEY,
Notary Public for Oregon.

[Endorsed]: Creditor's Proof of Claim and Letter of Attorney. Filed Nov. 19, 1913. A. M. Cannon, Clerk. U. S. District Court. [4]

[Title of Court and Matter.]

[**Exhibit "A" to Petition for Revision—Stipulation
of Facts.**]

It is hereby stipulated and agreed by and between R. L. Sabin, trustee of the estate of Rohrbacher Automatic Air Pump Company, a corporation, bankrupt, acting through his attorney of record, Sidney Teiser, and J. H. Peterson, acting through his attorneys of record, Wood, Montague & Hunt, that the following facts are, and are stipulated and admitted to be true in the above-entitled cause, and that no further proof of the same need be introduced at the trial of said cause, and that they shall be accepted as agreed facts and that this stipulation be, and the same hereby is made a part of the record in the above-entitled cause now pending before the referee in bankruptcy for the district of Oregon; that it can be used upon any trial of this cause in said referee's court, or in the District Court of the United States for the District of Oregon, or in any Appellate Court, the same as if written and oral testimony thereof had been introduced, after witnesses duly sworn, and the calling or swearing of witnesses or the introduction of written proof to prove the same is hereby expressly waived.

I.

It is stipulated and agreed that on or about October 29, 1912, the Rohrbacher Automatic Air Pump Company being in need of funds, borrowed \$3,000 from J. H. Peterson, [5] which was to be applied upon its debts, and that the Rohrbacher Automatic Air

Pump Company was not insolvent at that date, or if insolvent, that J. H. Peterson did not and had no occasion to know or be informed that such insolvency existed.

II.

It is further stipulated and agreed that this mortgage was executed under the authority of the board of directors, pursuant to a duly called meeting, and the minutes of that meeting, so far as pertinent, read as follows:

“Upon motion duly seconded it was thereupon unanimously resolved that this company give to J. H. Peterson the mortgage of the company covering all its assets, including its leasehold, its patents and good will and royalties, to secure said loan, and authorizing and directing M. E. Hetrick, secretary of the company, to execute in the name of the company, under its corporate seal, such note of bond and mortgage.”

III.

It is further stipulated and agreed that the copy of the mortgage hereto appended and marked Exhibit “A” is a true and correct copy of the original mortgage and of the whole thereof, and that the original mortgage was duly executed and delivered for a consideration of \$3,000 in cash paid by the said J. H. Peterson, and that J. H. Peterson is the owner and holder thereof and of the original note, and that a true and complete copy of said note appears in said mortgage and in the copy thereof hereto appended and marked Exhibit “A.”

IV.

It is stipulated and agreed that no portion of said note, either of principal or of interest, has been paid, and that the same and every part thereof is now due and payable and remains unpaid. [6]

V.

It is stipulated and agreed that the parties to said mortgage impliedly agreed and consented when said mortgage was given that the mortgagor should continue to conduct its business of manufacturing and selling pumps at wholesale and retail and that such pumps should be made out of materials then on hand, and that the proceeds of such sales, together with the proceeds of the sale of such pumps as were on hand at the time the mortgage was executed, should be used by the mortgagor as it saw fit.

VI.

It is further stipulated and agreed that said power of sale reserved in the mortgagor was not intended to and did not extend to the machinery, tools, equipment, office furniture and fittings or safe, covered by said mortgage. It is further stipulated that the assets of the Rohrbacher Automatic Air Pump Co., at the time of the execution of the mortgage, consisted of the property above mentioned, concerning which there was no power of sale reserved in the mortgagor, and also consisted of numerous pumps already manufactured, and also considerable supplies and materials, a large portion of which were subsequently made into pumps, and which, together with the pumps on hand at the time of the execution of the mortgage, were sold without objection and with the

implied consent of the mortgagee.

VII.

It is further stipulated and agreed that the actual intention with which the mortgage was given was not fraudulent, but by this stipulation it is not intended either to admit or deny that there was not an implied fraudulent intent. [7]

VIII.

It is further stipulated and agreed that J. H. Peterson, at the time of advancing said \$3,000 and of accepting said mortgage as security for its repayment, had no actual knowledge that said Rohrbacher Automatic Air Pump Company had any creditors other than those whose claims were to be satisfied by said loan.

IX.

It is stipulated and agreed that said mortgage was duly recorded in the office of the county clerk of Multnomah county, Oregon, on November 6, 1912, and that it ever since has been and now is of record there, and that the same remains unsatisfied.

X.

It is stipulated and agreed that the bankrupt corporation was engaged in the manufacture and sale, at wholesale and retail of air pumps.

(Sd.) WOOD, MONTAGUE & HUNT and
M. M. MATTHIESSEN,

Attorneys for J. H. Peterson.

(Sd.) SIDNEY TEISER,

Attorney for R. L. Sabin, Trustee. [8]

[Endorsed]: Filed Nov. 22, 1913. A. M. Cannon,
Clerk U. S. District Court.

Exhibit "A" to Stipulation of Facts—Mortgage.

THIS INDENTURE, made the 29th day of October, in the year of our Lord one thousand nine hundred and twelve, between ROHRBACHER AUTOMATIC AIR PUMP COMPANY, an Oregon corporation, of the city of Portland, County of Multnomah, State of Oregon, the party of the first part, and J. H. PETERSON, of the city of Portland, county of Multnomah, State of Oregon, party of the second part.

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Three Thousand Dollars, Gold Coin of the United States, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does grant, bargain, sell, assign and convey unto the said party of the second part, certain goods and chattels now being in the premises known as No. 173 East Water Street, Portland, Multnomah County, State of Oregon, and being all of the property owned by the party of the first part and consisting of machinery, tools, equipment, supplies, office furniture, fittings and safe, and also the good will of the business conducted by the party of the first part, and any and all patents owned by it and contracts and royalties and its leasehold interest in said premises known as No. 173 East Water Street, Portland, Oregon.

TO HAVE AND TO HOLD the said goods and chattels unto the said party of the second part, his executors, administrators or assigns forever.

PROVIDED, NEVERTHELESS, and these presents are on the express condition that if the said party of the first part, its successors or assigns, shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the sum of Three Thousand Dollars, and interest thereon at the rate of [9] eight per cent per annum in accordance with the terms of one certain promissory note, of which the following is a substantial copy:

**[Promissory Note, Dated October 29, 1912, for
\$3,000.]**

\$3,000.00 Portland, Oregon, October 29th, 1912.

Six months after date, without grace, ROHRBACHER AUTOMATIC AIR PUMP COMPANY, promises to pay to the order of J. H. PETERSON, at United States National Bank, at Portland, Oregon, Three Thousand Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin, at the rate of eight per cent. per annum from date until paid, for value received. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, Rohrbacher Automatic Air Pump Co. promises and agrees to pay in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for attorney's fees

to be allowed in said suit or action.

ROHRBACHER AUTOMATIC AIR PUMP
COMPANY.

[Corporate Seal]

By M. E. HETRICK,
Secretary.

No. ———

then these presents shall be void. But in case default shall be made in the payment of the said principal sum, or interest or any one of the said installments of the principal or interest, or if said property is attempted to be removed by any one from where it is now situated, or be attached or levied upon by the creditors of said party of the first part, or shall be sold, transferred or assigned, or attempted to be sold, transferred or assigned, then said [10] promissory note shall at once become due and payable, and it shall and may be lawful for, and the said party of the first part does hereby authorize and empower the party of the second part, with the aid and assistance of any person or persons, to enter the place, No. 173 East Water Street and other premises, and such other place or places as the said goods and chattels are or may be placed, and take or carry away the said goods and chattels, and sell or dispose of the same at private sale, with or without notice to said party of the first part, or to sell the same at public auction, upon giving 4 weeks' notice of the same in a newspaper of general circulation, published in said county and state, and out of the money arising therefrom, to retain and pay the said sum above mentioned, and interest as aforesaid, and all charges touching the same, and including a reason-

able sum as counsel fees rendering the overplus, if any, unto the said party of the first part. And the party of the first part may retain and continue in the quiet and peaceful possession of the said goods and chattels, and in the full and free use and enjoyment of the same except as hereinbefore mentioned.

And the said party of the first part does hereby further promise and agree to pay at maturity all taxes, liens or other incumbrances now subsisting, or hereafter to be laid or imposed upon said goods and chattels, and to keep the said property fully insured for a sum not less than \$—— during all such time, and in one or more good and responsible fire insurance companies, against all loss or damage by fire; the loss or damage, if any, to be made payable to the said party of the second part; and in case the said party of the first part shall fail or refuse to obtain such insurance, or to pay all taxes, liens and incumbrances aforesaid, before the same shall become delinquent, then the said party of the second part may, at his option, obtain such [11] insurance and pay the premium therefor, and may pay all such taxes, liens and other incumbrances before or after the same shall have become liens upon said property, and all sums of money thus expended are hereby secured by these presents, and shall be repayable on demand from said party of the first part to the said party of the second part and may be retained by the party of the second part from the proceeds of the sale above authorized.

IN WITNESS WHEREOF, the party of the first part has caused these presents to be executed in its

name and under its corporate seal by M. E. Hetrick, its Secretary, in accordance with due resolution of its Board of Directors.

ROHRBACHER AUTOMATIC AIR
PUMP COMPANY,

[Corporate Seal] By M. E. HETRICK,
Secretary.

Executed in the presence of:

M. COLPITTS.

P. P. DABNEY.

State of Oregon,

County of Multnomah,—ss.

I, M. E. Hetrick, being first duly sworn, say that I am the Secretary of Rohrbacher Automatic Air Pump Company and am authorized to make this affidavit; that Rohrbacher Automatic Air Pump Company is the sole and exclusive owner of the property described in this mortgage and in the lawful possession thereof; that the same is paid for in full, and that there are no incumbrances or liens of any kind whatsoever existing at this date against said property.

M. E. HETRICK.

Subscribed and sworn to before me this 29th day of October, 1912.

[Notarial Seal]

P. P. DABNEY,

Notary Public in and for Oregon. [12]

State of Oregon,

County of Multnomah,—ss.

THIS CERTIFIES, that on this 29 day of October, 1912, before me, the undersigned, a notary public in and for said county and State, personally appeared

M. E. Hetrick, to me personally known to be the Secretary of Rohrbacher Automatic Air Pump Company, the corporation above named, who being first duly sworn, did say that he, the said M. E. Hetrick, is the Secretary of said Rohrbacher Automatic Air Pump Company, the corporation named and described in the within and foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed and executed on behalf of said corporation by authority of its Board of Directors; and said M. E. Hetrick, Secretary as aforesaid, acknowledged said instrument to be the free act and deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my notarial seal on this, the day and year in my certificate first above written.

[Notarial Seal]

P. P. DABNEY,

Notary Public in and for Oregon. [13]

[Title of Court and Matter.]

Order Disallowing Reclamation Petition of J. H. Peterson Based on Chattel Mortgage.

At a Court of Bankruptcy held at Portland, in the Above-named District, November 13th, 1913, Before CHESTER G. MURPHY, Referee:

This matter comes on for hearing upon the petition of J. H. Peterson, holder of a blanket chattel mortgage in the sum of \$3,000.00, upon all of the personal property of the bankrupt estate, consisting of machinery, tools, supplies, office furniture, fittings, safe, and stock in trade, and patent rights and good-

will, and it appearing that said reclamation petition was filed herein Oct. 22d, 1913, and amended petition filed Nov. 8th, 1913, accompanied by stipulation of facts agreed upon by counsel for the Trustee, and brief of J. H. Peterson, in support of reclamation petition, and brief of Trustee in opposition to said petition having heretofore also been filed, and the matter having been carefully considered by the Referee,

IT IS NOW ORDERED that the reclamation petition of said J. H. Peterson be, and the same hereby is, disallowed, leave being hereby granted to said J. H. Peterson to file his claim as a general claim against this estate. [13]

This is the third reclamation petition of similar nature that has been before this Court for determination in the past few months. In the P. J. Snyder case (in bankruptcy No. 2275, United States District Court for the District of Oregon) a similar blanket chattel mortgage on drug stock and sundries and fixtures was held void as to creditors in bankruptcy, upon the ground of constructive fraud, and a similar ruling was made in the case of Re Klorfein (in bankruptcy No. 2250, United States District Court for the District of Oregon), in which latter case petitioner presented a chattel mortgage upon a stock of goods, consisting of groceries, fruit and sundries and fixtures. In both the Snyder and Klorfein cases review of the undersigned's ruling was requested and granted and upon such review, the ruling of the undersigned was sustained by Judge Wolverton. In neither of these cases was there any

charge of actual fraud, and such is the case in the matter of reclamation petition of J. H. Peterson—that is, utmost good faith at all times was evidenced by the mortgagee. The facts in the present case are admitted to be substantially as follows:

The bankrupt corporation, engaged in the business of manufacturing and selling certain patented pumps, to be attached to automobiles for the purpose of inflating tires, when necessary, borrowed from the petitioner herein J. H. Peterson, the sum of \$3,000.00 on or about Oct. 29th, 1912, and gave as security therefor its chattel mortgage as aforesaid. The money so borrowed was applied upon the debts of the bankrupt corporation and J. H. Peterson, at the time of making the loan, had no reasonable ground to [14] believe that the mortgagor was insolvent.

While the mortgage was placed of record, the mortgagor was permitted to continue in possession and to make up pumps from stock and materials on hand, sell the same freely, purchase new materials and in all respects continue the business as before the execution of the mortgage in question.

Claimants admit that as to the changing stock of material and equipment and pumps, the mortgage is void as to creditors in bankruptcy, but strenuously contend that as to the machinery and fixtures and furniture, the mortgage should be upheld.

The matter is, to my mind, *res adjudicata*, so far as this court of bankruptcy is concerned, but counsel for petitioner has requested reconsideration of the entire matter upon the theory that there has been

an authoritative decision by the Supreme Court of this State in which a chattel mortgage on a changing stock of goods, and fixtures, was held void as to the stock and valid as to the fixtures, and that therefore this mortgage, similar in character, should not be held void in whole.

The case in question, and relied upon by counsel, in their able brief in support of this petition, is that of Bremer and Company against Fleckenstein-Mayer & Co. reported in 9th Oregon, 266, but a careful consideration and examination of this case leads me to the belief that the contention of counsel for petitioner herein, is not well taken.

In the case under discussion, one Haas was conducting a wholesale and retail liquor business in the city [15] of Portland, and on the 2d day of June, 1879, gave a mortgage to Fleckenstein-Mayer & Company upon his entire stock of wines, cigars and liquors, some bar-room fixtures and other personal property to secure a debt of \$4,000.00, and the mortgage was duly filed and recorded on June 6th. Haas, the mortgagee, was left in possession and he continued to sell at retail both for cash and on credit, from his stock of goods. On July 7th, 1879, however, Bremer & Co., a creditor of Haas in the sum of \$289.00, brought suit and attached the property in question. Thereupon Fleckenstein-Mayer & Company proceeded forthwith to foreclose and shortly obtained a decree of foreclosure and conducted a sale of the mortgaged property and realized thereon the sum of \$1,240.00. Some few days later Bremer & Company reduced their claim to judgment for the

full amount sued for, with costs and interest, and after the clerk of the Court had paid over the proceeds from the sale to Fleckenstein-Mayer & Company, Bremer & Company brought a suit in equity to impeach and set aside the mortgage, upon the ground of fraud and prayed for a personal decree against Fleckenstein-Mayer & Company as Trustee of moneys held for their benefit in the amount of their judgment. After reference to a Referee, the lower court gave judgment in favor of Bremer & Company against Fleckenstein-Mayer & Company for \$200.00, and costs, and from this judgment Fleckenstein-Mayer & Company appealed to the Supreme Court, where the judgment of the lower court was affirmed.

Counsel for petitioner Peterson claim that because the Referee found that the changing stock of [16] goods brought \$200.00 on foreclosure sale and the fixtures and furniture and other personal property brought \$1,040.00, and this finding was incorporated in the decree of the lower court that by implication at least, if not in fact, the Referee held that while the mortgage was void as to the changing stock of goods, that it was valid as to the fixtures, and the Supreme Court having confirmed the decision of the lower court, likewise so held by implication.

But a careful reading of the decision of Judge Watson discloses the fact that the mortgage was treated as wholly void and that the judgment of the lower court was merely affirmed. The Court, upon the appeal of Fleckenstein-Mayer & Company, being in no manner free to give judgment for more than

was granted in the lower court, and I am of the opinion, therefore, that the affirmance of the decree of the lower court, in no way binds the Supreme Court of this State to a ruling to the effect that a chattel mortgage on a changing stock of goods and fixtures is void as to stock and valid as to fixtures.

It is admitted that the validity of a chattel mortgage is determined by the law as laid down by the highest court of the State in which the mortgage was made, and that the law as thus declared by the highest tribunal of the State, will be recognized and enforced in the Federal Courts.

Etheridge vs. Sperry, 139 U. S. 266;

First National Bank of Pittsburg, Pa. vs. Title Guarantee and Trust Company (C. C. A. 3rd Cir., 24 Am. B. R. 330).

There being no authoritative decision of the [17] highest court of this State, and the Federal Court of the United States for the District of Oregon having declared similar mortgages not only collusively fraudulent and void in part but void in whole, there is nothing for this court of bankruptcy to do but to deny the reclamation petition filed herein under the facts above stated, and it is so ordered.

Dated, Portland, Oregon, November 13th, 1913.

(Sd.) CHESTER G. MURPHY,
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 19, 1913. A. M. Cannon,
Clerk, U. S. District Court. [18]

[Title of Court and Matter.]

Petition for Review of Referee's Order.

To Chester G. Murphy, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is a creditor of Rohrbacher Automatic Air Pump Company, the above-named bankrupt, and that his claim as a secured creditor has been filed herein.

That on the 13th day of November, 1913, an order, a copy of which is hereto annexed, was made and entered herein.

That said order was and is erroneous in that it declares a certain chattel mortgage dated October 29th, 1912, given by said bankrupt to this petitioner to secure the repayment of three thousand dollars (\$3,000), with interest, and purporting to cover, *inter alia*, a changing stock of supplies, void *in toto* as to unsecured creditors of the bankrupt, and further in that it fails to declare said mortgage a valid and subsisting lien upon all the machinery, tools, equipment, office furniture and fitting and safe covered by said mortgage.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the bankruptcy law of 1898 and General Order XXVII.

Dated at Portland, Oregon, this 17th day of November, 1913.

(Sd.) J. H. PETERSON,
Petitioner.

[Endorsed]: Filed Nov. 19, 1913. A. M. Cannon,
Clerk U. S. District Court. [19]

[Title of Court and Matter.]

Referee's Certificate on Review.

To the Honorable CHARLES E. WOLVERTON,
and to the Honorable ROBERT S. BEAN,
Judges of the Above-entitled Court:

I, Chester G. Murphy, the Referee in charge of
this proceeding, do hereby certify:

That in the course of the administration of said
estate, an order, a copy of which is annexed to the
petition hereinafter referred to, was made and en-
tered on the 13th day of November, 1913, denying as
a secured claim the reclamation petition of J. H.
Peterson in the sum of Three Thousand Dollars
(\$3,000.00), based on chattel mortgage on certain as-
sets taken possession of by the Trustee as belonging
to said estate.

That on the 18th day of November, 1913, said peti-
tioner J. H. Peterson, feeling aggrieved thereat, filed
a petition for a review which was granted.

That a summary of the evidence on which said or-
der was based is as follows:

Petitioner filed his claim in said proceeding as a
secured creditor and based his claim thereto on chat-
tel mortgage on machinery, furniture, fixtures and
materials. The loan was made by said petitioner in
good faith more than four months prior to the insti-
tution of bankruptcy proceedings. [20] A full
statement of the facts is set out in detail in order,

copy of which is attached to petition for review.

That chattel mortgage in question covered, in addition to machinery and fixtures, a changing stock of merchandise and materials for manufacturing the product of said corporation, to wit, an automatic air pump, and in view of the decision of your Honorable Court in re Klorfein (In Bankruptcy, No. 2250, United States District Court for the District of Oregon), and In re Snyder (In Bankruptcy, No. 2275, United States District Court for the District of Oregon), in both of which cases, upon appeal from the bankruptcy court, your Honors held that a mortgage given in this State on a changing stock of goods and fixtures, void as to the stock, was likewise void as to the fixtures and, therefore, void in whole as to creditors in bankruptcy.

I deemed that this matter was *res adjudicata*, and therefore denied the petition as aforesaid.

The question presented in this review is, in so ruling, did the undersigned err?

I hand up herewith for the information of your Honorable Judges, the following papers:

- 1st: Petition of J. H. Peterson, claimant.
- 2d: Stipulated statement of facts.
- 3d: Brief of claimant in support of petition.
- 4th: Opposing brief of the Trustee.
- 5th: Original of the ruling of the undersigned denying the prayer of said petition.
- 6th: Petition for review.

Dated Portland, Oregon, November 20th, 1913.

Respectfully submitted,
(Sd.) CHESTER G. MURPHY,
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 22, 1913. A. M. Cannon,
Clerk. U. S. District Court. [21]

**[Exhibit "B" to Petition for Revision—Judgment
Affirming Order of Referee in Bankruptcy.]**

[Title of Court and Matter.]

[Judgment.]

This cause was submitted to the Court for a review of the order made by the referee in bankruptcy herein, on the 13th day of November, 1913, denying as a secured claim the reclamation petition of J. H. Peterson in the sum of \$3,000, based on a chattel mortgage on certain assets taken into possession of by the trustee as belonging to said estate;

ON CONSIDERATION WHEREOF it is ORDERED and ADJUDGED that said order of the said referee be, and the same is, hereby affirmed.

Witness the Honorable CHARLES E. WOLVERTON, Judge of said court and the seal thereof, this 15th day of December, 1913.

[Seal]

A. M. CANNON,
Clerk.
By F. L. Buck,
Deputy.

[Endorsed]: Filed Dec. 15, 1913. A. M. Cannon,
Clerk U. S. District Court. [22]

[Opinion.]

[Title of Court and Matter.]

SIDNEY TEISER, for Trustee.

WOOD, MONTAGUE & HUNT and M. M. MATTHIESSEN, for Petitioning Creditor.

WM. D. FENTON, BEN C. DEY and K. L. FENTON, for the Bankrupt.

WOLVERTON, District Judge:

This case comes here on certificate of the Referee in Bankruptcy for revision. The only question presented is whether a chattel mortgage given covering machinery, tools, equipment, supplies, office furniture, fittings and safe is void *in toto* by reason of the fact as stipulated that the mortgagor was permitted to continue its business of manufacturing pumps out of the materials and supplies then on hand and mentioned in the mortgage, and to sell and dispose of said pumps, together with such as were on hand, at wholesale and retail, as it saw fit, and to use the proceeds arising therefrom without accounting to the mortgagee.

This Court, in a recent case unreported, *In re M. Klorfein*, Bankrupt, held that such a mortgage was void *in toto*. It is now contended, as it was previously, that the Supreme Court of the State has, in the case of *Bremer & Co. vs. Fleckenstein & Mayer*, 9 Ore. 266, decided to the contrary, and that this Court is bound by the decision of the Supreme Court.

[23]

After a careful re-examination of the case, it is

very clear to my mind that the Supreme Court has not so held. The facts briefly in that case are, that one Haas mortgaged to Fleckenstein & Mayer a stock of wines, liquors and cigars and certain bar-room fixtures. A little later Bremer & Co. sued Haas and attached the mortgaged property, and in due course recovered judgment for \$289, with interest, and costs taxed at \$24.20. Fleckenstein & Mayer attempted to foreclose their mortgage, and the property under the mortgage was sold for \$1,240, \$200 of that being for proceeds of the wines, liquors and cigars, and the remainder for the fixtures and furniture. This money was paid into the hands of Fleckenstein & Mayer. Later Bremer & Co. brought suit against Fleckenstein & Mayer to impeach the foreclosure decree, they having not been made a party to the suit under which the foreclosure was obtained. Bremer & Co. obtained a decree against Fleckenstein & Mayer for \$200 and the costs of the suit. From this decree Fleckenstein & Mayer appealed to the Supreme Court, and the decree was affirmed. This is the reasoning of the Court upon the question presented:

“Here, then, we find Haas, after the execution of the mortgage to appellants, carrying on his business in the same manner as before, selling off the mortgaged stock in trade, and paying his own expenses, and keeping up his stock by fresh purchases out of the proceeds of such sales, rendering no account to the holders of the mortgage, and in reality under no more restraint than if it had not been in existence. And yet its obvious effect was to ward off his other

creditors, and hinder and delay the collection of their demands against him, and the [24] appellants must be presumed to have so intended. We have no hesitation in declaring that such an arrangement was a fraud upon the other creditors, and cannot be upheld."

The lower court, it would seem, declared the mortgage void as to the wines and liquors, but not as to the fixtures. Hence the judgment for \$200 only. But the only question presented to the Supreme Court was whether the mortgage was void to the extent it was so declared by the court below. The question whether the mortgage was void *in toto* was not before the Supreme Court, nor was it decided by implication, as the case was disposed of without necessarily disposing of that question. If Bremer & Co. had appealed and insisted that they should have had a decree for a larger sum against Fleckenstein & Mayer, then the question whether the mortgage was void *in toto* would have been squarely presented. So it is clear to my mind that the Supreme Court has not held that a mortgage covering the two kinds of property is void only as to stock in trade and valid as to fixtures. A very recent case of the Supreme Court of the State (Greig vs. Mueller et al., 133 Pac. 94), has interpreted the Bremer case as holding only that a mortgage given with an understanding that the mortgagor might continue in possession with authority to sell the goods at retail and use the proceeds for himself, was void as to creditors.

Having so construed the holding of the Supreme

Court, I adhere to my opinion in the case of *In re M. Klorfein*, and therefore declare the mortgage in the present case void *in toto*.

[Endorsed]: Filed Dec. 15, 1913. A. M. Cannon, Clerk. By G. H. Marsh, Deputy. [25]

[Petition for Appeal and Allowance Thereof.]

[Title of Court and Matter.]

The above-entitled J. H. Peterson, conceiving himself aggrieved by the order and judgment made and entered on the 15th day of December, 1913, in the above-entitled court and cause, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which such judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WOOD, MONTAGUE & HUNT,
P. P. DABNEY and
M. M. MATTHIESSEN,

Attorneys for J. H. Peterson, Petitioner.

The foregoing claim of appeal is allowed on this 24th day of December, 1913.

CHAS. E. WOLVERTON,
District Judge.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon, Clerk. U. S. District Court. [26]

[Title of Court and Matter.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that whereas, on December 15th, 1913, at a District Court of the United States for the District of Oregon, in a proceeding depending in said court between J. H. Peterson, petitioner, and R. L. Sabin, trustee of Rohrbacher Automatic Air Pump Company, bankrupt, an order and judgment was made and entered against said J. H. Peterson disallowing his petition in reclamation and his claim as a secured creditor in the sum of three thousand dollars (\$3,000) against said Rohrbacher Automatic Air Pump Company, bankrupt; and

Whereas, said J. H. Peterson has obtained an appeal and filed a copy thereof in the clerk's office of this court, to reverse said order and judgment and a citation directed to said R. L. Sabin, trustee of Rohrbacher Automatic Air Pump Company, bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, in said circuit, on the 2d day of February, 1914:

Now, therefore, in consideration of the premises, we, J. H. Peterson, as principal, and the United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the state of Maryland, as surety, are held and firmly bound unto said R. L. Sabin, trustee of Rohrbacher Automatic Air Pump Company, bank-

rupt, in the full and just sum [27] of \$250.00, to be paid to said R. L. Sabin, his executors, administrators, successors and assigns, and to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

The condition of the above obligation is such, however, that if said J. H. Peterson prosecute his appeal to effect and answer the damages and costs, if he fail to make his plea good, then said above obligation shall be void; otherwise to remain in full force and effect.

Witness our hands and seals this 23d day of December, 1913.

J. H. PETERSON. [Seal]

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, [Seal]

By DOUGLAS R. TATE,
Attorney in Fact.

Approved by

CHAS. E. WOLVERTON,

District Judge.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon,
Clerk. U. S. District Court. [28]

[Title of Court and Matter.]

Assignment of Errors on Appeal.

Your petitioner assigns the following as the errors upon which he will rely upon his appeal from the order and judgment made and entered in the above-

entitled court and cause on the 15th day of December, 1913.

Your petitioner believes and alleges said order and judgment to have been erroneous in that:

(1) The Court declared petitioner's mortgage void *in toto* as to creditors of the mortgagor.

(2) The Court failed to hold petitioner's mortgage valid in part as against creditors of the mortgagor.

(3) The Court failed to hold petitioner's mortgage a valid lien upon that property of the mortgagor over which no power of sale with a right to the proceeds had been impliedly given or reserved to the mortgagor.

(4) The Court disallowed petitioner's claim in the sum of three thousand dollars as a secured creditor.

(5) The Court failed to allow petitioner's claim in the sum of three thousand dollars as a secured creditor or at all.

(6) The Court failed to allow petitioner's claim in the sum of three thousand dollars.

(7) The Court affirmed the order of the referee holding petitioner's mortgage void *in toto* and disallowing petitioner's claim in the sum of three thousand dollars as a secured creditor or at all. [29]

(8) The Court affirmed the order of the referee which failed to allow petitioner's claim in the sum of three thousand dollars.

(9) The Court held appellant's chattel mortgage void *in toto* under the laws of Oregon, though it was given with an entire absence of bad faith on the part

of both mortgagor and mortgagee, for the reason that it was void as to a portion of the property therein described over which the mortgagor had impliedly reserved the power of sale with the right to use the proceeds thereof as he saw fit.

(10) The Court made and entered the following order and judgment:

“This cause was submitted to the Court for a review of the order made by the referee in bankruptcy herein, on the 13th day of November, 1913, denying as a secured claim the reclamation petition of J. H. Peterson in the sum of \$3,000 based on a chattel mortgage on certain assets taken into possession of the trustee as belonging to said estate;

“On consideration whereof, it is ordered and adjudged that said order of the referee be, and the same is, hereby affirmed.”

Wherefore your petitioner prays that the Court allow an appeal from said order and judgment, and that the same be reversed, and that said Court be directed to enter an order and judgment herein allowing petitioner's claim in the sum of three thousand dollars with interest as a secured creditor and declaring petitioner's said chattel mortgage valid as to a part of the property described therein.

WOOD, MONTAGUE & HUNT,
C. E. S. WOOD,
P. P. DABNEY and
M. M. MATTHIESSEN,

Attorneys for Appellant.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon,
Clerk, U. S. District Court. [30]

[Title of Court and Matter.]

Citation [on Appeal].

The United States of America,
Ninth Judicial Circuit,—ss.

To R. L. Sabin, Trustee of Rohrbacher Automatic
Air Pump Company, Bankrupt:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in said circuit, on the 23d day of January, 1914, pursuant to a petition on appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the District of Oregon, in the matter of Rohrbacher Automatic Air Pump Company, bankrupt, to show cause, if any there be, why the order and judgment rendered in said judgment affirming the order of the referee and disallowing the petition in reclamation and claim of J. H. Peterson as a secured creditor in the sum of \$3,000 against said Rohrbacher Automatic Air Pump Company, bankrupt, and holding a certain chattel mortgage dated October 29th, 1912, executed and delivered to said J. H. Peterson by said Rohrbacher Automatic Air Pump Company, void *in toto*, and of no effect, as in said petition of appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. CHAS. E. WOLVERTON,

Judge of said District Court, this 24th day of December, 1913.

CHAS. E. WOLVERTON,
United States District Judge. [31]

Personal service of the within citation in Multnomah, County, Oregon, on this 24th day of December, 1913, is hereby admitted.

SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee of the Estate of
Rohrbacher Automatic Air Pump Company,
Bankrupt.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon,
Clerk, U. S. District Court. [32]

**[Stipulation That Petition for Review and Appeal
may be Heard Simultaneously on Single Record.]**

[Title of Court and Matter.]

It is hereby stipulated and agreed by and between the parties hereto that inasmuch as counsel for J. H. Peterson are uncertain whether the proper procedure on review is by petition or by an appeal, that the petition to review the order of the District Court and the appeal therefrom may be heard simultaneously and upon a single printed record, and that such record shall be deemed and be taken as and for a record in both the proceedings by petition for review and on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 22d day of December, 1913.

SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee.
WOOD, MONTAGUE & HUNT,
C. E. S. WOOD,
P. P. DABNEY and
M. M. MATTHIESSEN,
Attorneys for J. H. Peterson.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon,
Clerk, U. S. District Court. [33]

[Title of Court and Matter.]

Praeipie [for Transcript of Record on Appeal].

To A. M. Cannon, Esq., Clerk of the District Court:

Please prepare, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, copies of:

Proof of claim filed by J. H. Peterson in October, 1913.

Stipulation of facts.

Order of referee denying validity of petitioner's mortgage.

Petition for review of referee's order.

Certificate of referee.

Order and judgment of District Court thereon.

Opinion of the District Court.

Petition on appeal and allowance thereof.

Bond on appeal.

Assignment of error.

Citation on appeal.

Stipulation that cause may be submitted on one record.

This praecipe.

Dated at Portland, Oregon, this 22d day of December, 1913.

(Sd.) WOOD, MONTAGUE & HUNT,
C. E. S. WOOD,
P. P. DABNEY and
M. M. MATTHIESSEN,

Attorneys for Petitioner, J. H. Peterson.

Personal service of the within praecipe by certified copy thereof is hereby admitted at Portland, Oregon, December 22, 1913.

SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon,
Clerk. U. S. District Court. [34]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
District of Oregon.*

United States of America,
District of Oregon,—ss.

I, A. M. Cannon, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages contain a full, true and complete transcript of the files and records of the said court in the matter of Rohrbacher Automatic Air Pump Company, bankrupt, in so far as the same apply to the claim of J. H. Peterson, and

the action and judgment of the Court with respect to said claim, all as the same appear of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 8th day of January, 1914.

[Seal]

A. M. CANNON,
Clerk. [35]

[Endorsed]: No. 2354. United States Circuit Court of Appeals for the Ninth Circuit. J. H. Peterson, Appellant, vs. R. L. Sabin, as Trustee of the Estate of the Rohrbacher Automatic Air Pump Company, a Corporation, Bankrupt, Appellee. In the Matter of Rohrbacher Automatic Air Pump Company, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Received and filed January 10, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

J. H. PETERSON,

Petitioner and Appellant.

vs.

R. L. SABIN, as Trustee of the Estate of Rohrbacher Automatic Air Pump Company, a Corporation, Bankrupt,

Respondent and Appellee.

In the Matter of Rohrbacher Automatic Air Pump Company, a Corporation, Bankrupt

Brief of Petitioner and Appellant

Petition for revision of and appeal from a certain order and judgment of the United States District Court for the District of Oregon.

STATEMENT OF THE CASE.

On October 29th, 1912, the Rohrbacher Automatic Air Pump Company was in need of funds to pay off its then debts and applied to J. H.

right to the proceeds had been impliedly given or reserved to the mortgagor.

(4) The Court disallowed petitioner's claim in the sum of three thousand dollars as a secured creditor.

(5) The Court failed to allow petitioner's claim in the sum of three thousand dollars as a secured creditor or at all.

(6) The Court failed to allow petitioner's claim in the sum of three thousand dollars.

(7) The Court affirmed the order of the referee holding petitioner's mortgage void in toto and disallowing petitioner's claim in the sum of three thousand dollars as a secured creditor or at all.

(8) The Court affirmed the order of the referee which failed to allow petitioner's claim in the sum of three thousand dollars.

(9) The Court held appellant's chattel mortgage void in toto under the laws of Oregon, though it was given with an entire absence of bad faith on the part of both mortgagor and mortgagee, for the reason that it was void as to a portion of the property therein described over which the mortgagor had impliedly reserved the power of sale with the right to use the proceeds thereof as he saw fit.

(10) The Court made and entered the following order and judgment:

“This cause was submitted to the Court for

review of the order made by the referee in bankruptcy herein, on the 13th day of November, 1913, denying as a secured claim the reclamation petitioner of J. H. Peterson in the sum of \$3,000 based on a chattel mortgage on certain assets taken into possession of the trustee as belonging to said estate;

“On consideration whereof, it is ordered and adjudged that said order of the referee be, and the same is hereby affirmed.”

The errors here specified in various forms raise but a single question, viz: Whether the chattel mortgage is void in toto or simply pro tanto and, therefore, no attempt to argue the various specifications of error separately will here be made.

POINTS AND AUTHORITIES.

I.

The validity of a chattel mortgage will be determined by the law as laid down in the highest tribunal of the State in which the mortgage was made, and the law as thus declared will be enforced in the federal courts.

Etheridge vs. Sperry, 139 U. S. 266, 271.

II.

Where a mortgagee has given the mortgagor an unlimited power to dispose of all the property mortgaged for the use of the mortgagor, the

mortgage is void as to creditors of the mortgagor, even though there was no actual fraudulent intent on the part of the mortgagor or mortgagee.

Lord's Oregon Laws, section 7396.

Wilkins v. Sabin, 31 Ore. 450, 456.

Catlin v. Currier, 1 Sawy. 7, Fed. Cas. No. 2518.

III.

Where the power to dispose of mortgaged property is not co-extensive with the lien of the mortgage, the mortgage is nevertheless void in toto, if the instrument was given with actual bad faith.

Grieg vs. Mueller (Ore. 1913), 133 Pac. 94, 95.

IV.

Where the power to dispose of mortgaged property is not co-extensive with the lien of the mortgage and the instrument was given in good faith, the mortgage is void pro tanto only and good as to the property over which no power of sale extended.

In re Kahley, 2 Biss. 383, 386.

In re Kirkbride, 5 Dill. 116, 118.

In re Reynolds, 153 Fed. 295, 297.

In re Soudan Mfg. Co. (C. C. A. 1902), 113 Fed. 804, 809.

Lund vs. Fletcher, 39 Ark. 325, 335.

Goodhart vs. Johnson, 88 Ill. 58, 61.

Lockwood vs. Harding, 79 Ind. 129, 133.

Bullene vs. Barrett, 87 Mo. 185, 189.

Cf. First National Bank vs. Hankampf
(N. Mex. 1911), 121 Pac. 31, 36.

Bremer & Company vs. Fleckenstein &
Mayer, 9 Ore. 266, 274.

Jones on Chattel Mortgages (4th Ed.),
Section 350 et seq.

ARGUMENT.

The facts can hardly be simpler. The petitioner holds a mortgage dated October 29th, 1912, covering the machinery, tools, equipment, office furniture fittings and safe, as well as the "supplies" of the bankrupt corporation. The consideration therefor was and is the sum of three thousand dollars (\$3,000) in cash, no part of which has ever been repaid. The mortgage is formally sufficient, and was promptly and properly recorded. It was taken and given in good faith some ten months prior to bankruptcy and at a time when Mr. Peterson had no occasion to and did not surmise that the company was insolvent, nor was it then insolvent (Transcript, page 13). But the very purpose of the loan was to enable the company to pay its debts and continue in business, so that necessarily the "supplies" would be used in the manufacturing operations in which the concern was then engaged.

The trustee in bankruptcy now argues, not

merely that the mortgage is void as to the "supplies" (which we admit), but he has urged that Mr. Peterson should be even further mulcted by declaring the mortgage void in toto, thus giving to the unsecured creditors of the bankrupt the full benefit of the valuable machinery composing the bankrupt's plant and constituting the chief asset of the defunct concern. The result of such a holding obviously would be to deprive the petitioner of all rights which he might have as a secured creditor.

The trustee's position would seem, we believe, unjust if not audacious to a layman; yet since his position has been approved and upheld by the District Court as well founded in law, if not in reason, we proceed to a consideration of the legal aspects of the case in the belief that we can show the legal concept of justice, in this instance at least, to be not unlike that dictated by our moral sense.

The validity of a chattel mortgage will be determined by the law as laid down in the highest tribunal of the state in which the mortgage was made, and the law as thus determined will be enforced in the federal courts. *Etheridge vs. Sperry*, 139 U. S. 266, 271. Our question, therefore, at the very outset will be: What is the holding of the supreme court of the state of Oregon upon the precise question here involved?

The cases fortunately are few and naturally divide themselves into two groups; first, cases

where the apparent lien of the mortgage and the power of sale and disposition are co-extensive, i. e., where the mortgagee is empowered to sell any and all of the property covered by the mortgage and apply the proceeds thereof to his own purposes; and, secondly, cases where the power of sale reserved in the mortgagor extends to only a portion of the property mortgaged.

Of the first class the leading case in this state is *Orton vs. Orton*, 7 Ore. 478. There a mortgage had been given upon a stock of merchandise, **and nothing else**, and it appeared from the evidence and the court found that the mortgagee at the time of taking his mortgage had intended that the mortgagor should continue in possession and sell any and all of the mortgaged property just as if no mortgage existed and apply the proceeds to the mortgagor's own use and benefit.

Upon these facts, the court, at page 482, said:

“We think that where it appears either on the face of the mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor an unlimited power to dispose of the property mortgaged, for the use of the mortgagor, that the mortgage is void as to purchasers and attaching creditors of the mortgagor.”

In *Jacobs Bros. vs. Ervin*, 9 Ore. 52, the only property mortgaged was a part of a stock of goods, apparently farm machinery.

In *Aiken vs. Pascall*, 19 Ore. 493, the mort-

gaged property consisted solely of a stock of shoes (page 494) and what is of equal importance the court found the giving of the mortgage to have been permeated with **actual fraud** (page 495).

In *Fisher vs. Kelly*, 30 Ore. 1, the mortgage covered simply a stock of goods, namely, a stock of woolen and other cloth (page 3) and the trial court found that the mortgage was given with the express intention of defrauding creditors (page 15) and that it for that purpose was withheld from record. (Whether or not the withholding from record of a chattel mortgage is a fraud against creditors presents a question upon which there is a conflict of authority, but it obviously is without the range of this brief and of the question herein discussed.)

A stock of furniture only was mortgaged in *Sabin vs. Wilkins*, 31 Ore. 450, but there the mortgage was upheld and so the case is of little moment here in any event.

Of the second class of cases, those where the power of sale is not co-extensive with the lien of the mortgage, but three have been found.

In *Currie vs. Bowman*, 25 Ore. 360, a mortgage had been given by the Durand Organ & Piano Company to the defendant Bowman upon its stock of goods and fixtures (page 373). The plaintiff as receiver then brought suit to cancel the mortgage as void against creditors.

The mortgage, however, was held valid in

toto by the supreme court on the ground that though the mortgagor had retained possession and power of sale as to the stock of goods, the mortgagee had regularly compelled a strict accounting of the proceeds of the sale and had applied them in partial discharge of the mortgage debt. That this is the law generally must be conceded, but its application to the facts of the instant case is not seen.

In *Grieg vs. Mueller* (Ore. 1913) 133 Pac. 94, it appeared that one Howard H. Ford, a dealer in automobiles at Vale, Oregon, had given a chattel mortgage to defendant for the use and benefit among others of First National Bank of Vale, covering one lathe, one drill press, one electric motor, two gasoline tanks, all tools, fixtures, appliances and all stock in trade. Later Ford, having been adjudged a bankrupt, plaintiff was appointed trustee of his estate and brought a suit to cancel the chattel mortgage.

The instrument contained a provision expressly empowering the mortgagor, who was to remain in possession, to sell the property, but required him to account for the proceeds to the mortgagee. Ford continued to sell the goods at retail in the usual way, keeping no specific account of his transactions. He paid his own personal expenses as well as the expenses of the business out of the receipts.

The supreme court held the mortgage void in toto, and why? Was it not because here,

though the mortgage covered machinery and fixtures, the power of sale included within its scope all of the property covered by the mortgage? And further is it not clear that the bank accepted the mortgage with the knowledge that Ford was making it for a fraudulent purpose, and that the bank itself did not in fact care for the mortgage but took it simply to benefit Ford personally, and that the whole transaction was tainted not merely with constructive but actual fraud?

“We conclude that the mortgage was executed by Ford for a fraudulent purpose; that the Vale Bank accepted it with knowledge of that purpose and for Ford’s benefit and permitted him to conduct the business as he had formerly done and for his own benefit and that as to other creditors the mortgage was void.”

Neither of these two cases then is authority for the remarkably harsh doctrine that the chattel mortgage given and taken in absolutely good faith and duly recorded is void in toto simply because the mortgagor is allowed to retain possession of the mortgaged property and is permitted to sell a relatively small portion thereof in the course of business and for his own use and benefit and with absolutely no intention upon the part of either mortgagor or mortgagee to hinder, delay or defraud creditors of the mortgagor.

The single case, therefore, which must be taken to have established the doctrine that the mortgage is void in toto in this state, if it be an

established doctrine here, is the case of *Bremer & Company vs. Fleckenstein & Mayer*, 9 Ore. 266. That there is some general language loosely considered apart from its context which might cause one to consider it to have been the holding of the court that a mortgage void in part is necessarily void in toto may be admitted, but we contend that this is precisely what the court did not hold in that case.

The facts are a trifle involved, but inasmuch as it is felt that the rights of this mortgagee to reimbursement for the \$3,000.00 advanced by him will depend largely upon this court's view of the law as laid down in this case, we ask the court's indulgence as we attempt to state the precise holding with some care.

To that end a statement of the facts is necessary. A Portland saloon keeper named Haas, on June 2, 1879, gave to *Fleckenstein & Mayer* a chattel mortgage upon a stock of wines, liquors and cigars, some bar-room furniture and other personal property to secure a debt of \$4,000.00. The mortgage was filed for record on June 6, 1879. Haas, with the mortgagees' consent, remained in possession and continued to sell the stock in trade, namely, the wines, liquors and cigars, at retail, both for cash and on credit, and solely for his own benefit until July 7, 1879, when all of the mortgaged property was attached at the instance of *Bremer & Company*, unsecured creditors of Haas. On July 8, 1879, the mort-

gagees instituted foreclosure proceedings and on July 21, 1879, the property was sold under this foreclosure proceeding for \$1,240.00 in cash, which was paid by the sheriff to the clerk of the circuit court. On July 24, 1879, Bremer & Company, having recovered a judgment against Haas in the attachment action for \$289.00, notified the clerk that they claimed enough out of the \$1,240.00 remaining in his hands to pay their judgment for \$289.00. The clerk having refused to pay them the amount claimed or any amount, Bremer & Company brought a suit to set aside the mortgage and decree based thereon on the ground that it had been made in fraud of creditors.

“The cause was then submitted to a referee to take the testimony and report his findings of fact, and conclusions of law therefrom. He found: ‘That it was understood between defendants Fleckenstein and Mayer at the time of the execution of said mortgage that Haas should continue in his business of retail liquor dealer, in Portland, Oregon, and sell, in the course of business, wines, liquors and cigars, and stock that was included in the mortgage, and replace the same. The proceeds of such sales to be used in the business by Haas, and the remainder paid to the defendants Fleckenstein and Mayer on the mortgage. That Haas so continued and sold, from the execution of the mortgage until plaintiffs’ levy, both for cash and upon credit. Fleckenstein and Mayer at the time knew that such sales were being made by Haas.’

“He also found that the value of the

stock of wines, liquors and cigars, at the time of respondent's attachment, was \$200, and the balance of the property, \$1,040. As a conclusion of law, he reported the respondents entitled to a decree setting aside said proceedings of foreclosure, and for the recovery of \$200 and costs.

“Objections were filed by both parties, but they were overruled, the report confirmed and a decree entered accordingly.”

It will be noted first that all of the mortgaged property was attached; secondly, that the stock of liquors, wines and cigars was worth \$200, while the fixtures, etc., were worth \$1,040.00, and finally that the referee found in favor of Bremer & Company in the sum of \$200.00, the value of the stock in trade only, and not for \$289.00, the amount of their judgment, though the funds in the hands of the clerk and realized from the sale of the mortgaged property were ample to pay the judgment in full. Yet the supreme court, after modifying the decree as to the amount of interest to be allowed, sustained the trial court in other respects, saying, at page 274:

“Here, then, we find Haas, after the execution of the mortgage to appellants, carrying on his business in the same manner as before; selling off the mortgaged stock in trade, and paying his own expenses, and keeping up his stock by fresh purchases out of the proceeds of such sales, rendering no account to the holders of the mortgage, and in reality under no more restraint than if it had not been in existence. And yet its

obvious effect was to ward off his other creditors, and hinder and delay the collection of their demands against him, and the appellants must be presumed to have so intended. We have no hesitation in declaring that such an arrangement was a fraud upon the other creditors, and cannot be upheld.

“We shall not discuss the testimony so far as it relates to the separate value of the stock of wines, liquors and cigars, as we are satisfied of the correctness of the findings of the Court below on this point.

“The decree of the lower court is erroneous in respect to the rate of interest allowed. Legal interest, not exceeding 10 per cent per annum, was all that could properly have been allowed.”

If the supreme court thought the mortgage void in toto why did it not permit Bremer & Company to recover the full amount of its judgment instead of limiting it to the amount at which the stock of goods was valued? Why did they not recover \$289 instead of simply \$200? We see no explanation other than the court held the mortgage void as to the property over which the power of sale extended, and valid as to the fixtures and other property which were not included within the scope of the power of sale.

If this be a correct interpretation of the case, then we submit that it is not the law of Oregon that a chattel mortgage is void in toto simply because clearly void in part because of the mortgagor's reserved power of sale as to a part of the property and his retention of possession. In

truth it would seem to be the law in this state that the mortgage is valid as to the property outside the scope of the power of sale vested in the mortgagor, though invalid in part for constructive fraud.

At any rate the case does not hold that the mortgage is void in toto, and this court, in the absence of a determination of the question here involved by the state court, must for itself find and declare the law. Therefore, the rational basis of the rule will now be discussed and the holdings of the courts of other states shown.

It may in the outset for the purposes of this case be admitted that where the circumstances show **actual** fraud on the part of the mortgagee, the mortgage will be held void in toto as to creditors; but the question raised upon the facts admitted to be true in this case, is simply whether the wrong of the mortgagee, being purely legal or constructive fraud, vitiates the mortgage in toto.

In *Hayes vs. Wescott*, 91 Ala. 143, 8 So. 337, it appeared that Williams, a druggist, for a valuable consideration, executed and delivered to the plaintiff a chattel mortgage on his stock in trade and furniture and fixtures. The mortgage expressly provided that the mortgagor should remain in possession and have the power to dispose of the goods in the regular course of business.

The court at page 337 said:

“The mortgage is confessedly void on its face as to the stock of goods. It is valid as to the fixtures dissociated from the stipulations as to the goods. The sole question presented by this record is whether the fact that the mortgage is constructively fraudulent on its face with respect to the goods avoids it in toto.”

After discussing the conflicting decisions in the various states of the Union the court proceeds, in one of the best considered opinions to be found in the books, to discuss the reason for the rule and the foundation for the doctrine, saying, at page 339:

“We are left, therefore, to choose between the two doctrines on principle, and unfettered by adjudications to constrain us towards either. The case we have involves no evil intent on the part of the grantee, either as a fact proved or as a fact imputed. The law is rather that a conveyance reserving a benefit is void as to creditors, irrespective of the intent of the parties, or either of them, than that the fact of a reservation raises an imputation of evil intent in both. The statute, as well as the common law, seizes upon the fact of reservation or declaration of trust as a basis for avoidance, wholly without regard to the grantor's real purpose, and without regard to the grantee's knowledge, actual or constructive, of, or participation in, that purpose. Hence it is, we think, safe to affirm that the mere fact of a reservation, standing alone, raises no presumption of bad intent in a grantee. There must be the concurrence of other circumstances. A grant by a person not in-

debted to others, and who does not subsequently become indebted to others than the grantee, is of course valid to all intents and purposes, notwithstanding it is made exclusively to the use of the grantor. So a grant, the natural effect of which would be to hinder and delay creditors, is entirely valid, there being no creditors. It follows that a grant to the use of the grantor, or reserving a benefit to him, does not necessarily raise an implication of bad faith in the accepting grantee, much less go to establish actual evil intent in him. To impute or show bad faith in the grantee, whether by construction merely or as a fact, it must appear, in addition to the trust created or benefit reserved on the face of the instrument, that the grantee was charged with inquiry into the purposes of the grant by a knowledge of the grantor's insolvency, or, at least, of the fact that he was indebted. Nothing short of this will suffice to impute to the grantee even that kind of bad intent which rests on legal presumptions. On these principles, Mrs. Hayes, the appellant, cannot be charged with any evil purpose whatever, either actual or constructive. She is not shown to have known of other debts. She is affirmatively shown not to have known of the mortgagor's insolvency. What is there, therefore, in her mind as a fact, or by imputation, to make her a particeps criminis with Williams? What is the evil thing on her part to taint, like the trail of the serpent, this transaction? How can she be holden to a covinous intent, and to its all-pervading and vitiating consequences, when there is not only no direct evidence of its existence, but also no evidence of any fact or circumstance from which the law would presume its existence? She cannot,

in our opinion, be so holden. All the cases and all the texts, whether they adhere to the one or the other of the doctrines we have stated, proceed on the theory that a conveyance of this sort is bad throughout, because it is tainted—it is infected—by a mental condition of the grantee which imports an element of criminality in the transaction. To criminality actual evil intent is essential. To ‘taint’ and to ‘infect,’ as these words are employed, involve, of necessity, the idea of that which is abstractly bad, and in point of fact offensive to the moral sense. The cardinal difference between those cases which hold conveyances which are void as to a part of the property, void as to the whole under all circumstances, and those which require to this result the existence of actual fraud, is that the former presume an evil purpose—a criminal design—in the grantee from the mere fact of accepting a deed containing a reservation, while the latter require some evidence of its existence, as a matter of fact before visiting punishment upon the grantee for entertaining it. We cannot find justification for the position first stated.”

This opinion has been thus extensively quoted because it most clearly draws the distinction between the cases where there was **actual fraud** on the part of the mortgagee and those in which the fraud is purely **constructive**, being inferred solely from the fact that a power of sale is reserved over a portion of the mortgaged property.

With this distinction in mind we ask the court to consider the following authorities:

In *Davenport vs. Foulke*, 68 Ind. 382, the chattel mortgage covered fixtures and a stock of jewelry and the mortgagor had power to sell the stock in the usual course of trade for his own benefit. There was no actual fraud.

The supreme court, at page 386, in upholding the mortgage as to the fixtures, said:

“In the well considered case of *Barnet vs. Fergus*, 51 Ill. 352, the Supreme Court of Illinois recognized the doctrine that a chattel mortgage which permits the mortgagor to sell the mortgaged property, and apply the proceeds to his own use, is void, but at the same time held that such a permission to sell only a portion of the mortgaged property did not necessarily render the mortgage void in toto; that the mortgage might still be valid as to that portion of the property which the mortgagor was not authorized to sell.

“The rule laid down in this last-named case impresses us as being both a just and reasonable rule, and as one which we ought to follow.”

In *Barnet vs. Fergus*, 51 Ill. 352, the mortgage was upon printing materials, presses and stock in trade. There was no fraud in fact apparent, but the mortgagor in the course of his business would necessarily use up the stock in trade and other printing material.

The court after recognizing the general doctrine that the mortgage is void as to the stock of goods, at page 355, is reported to have said:

“But it does not follow, from the principle above laid down, that where a mort-

gage covers different kinds of property, as, for example, a stock of goods in a store, held for the purposes of trade, and a parcel of horses upon a farm, because the mortgagee loses his right to enforce his mortgage as against creditors or purchasers in regard to the goods, he has therefore lost it in regard to the horses. It is to be remembered that the mortgage, in the case supposed, as in the case at bar, is a valid instrument upon its face and at its inception. But the mortgagee may lose his right to enforce it by subsequent acts, and he does so in regard to so much of the property as he permits the mortgagor to keep for the purposes of sale. But such subsequent acts in regard to a portion of the property do not necessarily render the mortgage void in toto. It may become invalid as to a part of the mortgaged property, and remain valid as to the residue. In the case above supposed, because the mortgagee has consented that the mortgagor shall sell his stock of goods, it would be extremely unreasonable to tell him he could not enforce his lien against the horses."

Another well considered opinion is that of *Rocheleau vs. Boyle*, 11 Mont. 451, 28 Pac. 872, where the mortgage covered fixtures and supplies in a bakery. The court, at page 879, said:

"The good faith of the parties in the transaction was admitted, and the question was, did the transaction, considering the conditions agreed upon between mortgagor and mortgagee concerning the property, or concerning certain portions of it, amount to a mortgage of chattels under the provisions of the statute? The facts are admitted. The mortgagor remained in possession of the property, and, as to the merchandise, he was

permitted, with the knowledge and tacit consent of the mortgagee, to go on dealing with, using, and disposing of his merchandise, and using the proceeds, without reference to the mortgage. When the facts which enter into a transaction are admitted or found, it is a question of law for the court to determine whether the transaction amounted to a mortgage, as provided by statute, or whether it lacked a vital element, touching the whole or part of the transaction. Although parties intended in good faith to make a chattel mortgage, when all the facts are found as to what they did in the transaction, it is a question of law as to whether or not that which was done fulfilled the requirements of the statute in the making of a mortgage. We hold that as to the merchandise one of the vital conditions of the mortgage was removed by consent of the parties, and as to that property the mortgage was without force or effect. * * *

“Upon the second proposition, in view of the fact that the good faith of the parties to the mortgage is admitted, we can find no just ground for holding the mortgage void as to property mentioned therein, other than merchandise. It is not contended that there was any arrangement, understanding or permission allowing the mortgagor to deal with such other property as he did with the merchandise and the proceeds derived therefrom. Where fraudulent intent was not the motive which led to the transaction, a defect by which it loses part of its intended effect is not held to vitiate the whole transaction. In the case of *U. S. vs. Bradley*, 10 Pet. 360, Mr. Justice Story, expressing the opinion of the Court concerning this feature of an instrument, says: ‘That bonds and other deeds may, in many cases, be good in

part, and void for the residue, where the residue is founded in illegality, but not **malum in se**, is a doctrine well founded in the common law, and has been recognized from a very early period.' ”

In *Eastman vs. Parkinson* (Wis. 1907), 113 N. W. 649, a case similar on its facts to the one here considered, the supreme court in sustaining the mortgage in part, said, at page 653:

“The trend of decisions in recent years is rather against defeating by judicial policy a good faith attempt, characterized by constructive fraud, to give and take a chattel mortgage. The Supreme Court of the United States, in *Etheridge vs. Sperry*, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 717, speaking on that subject, said:

“ ‘Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increasing facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith. * * * The law now generally requires a record of all such instruments. * * * Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? * * * The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in ninety-nine cases out of a hundred the taking of possession by a creditor results in closing the business, and turning the debtor out of employment. * * * Existing creditors may of course challenge the good faith of the transaction, but if they cannot dis-

turb an absolute sale when made in good faith, why should they be permitted to challenge a conditional sale if made in like good faith? The fact that fraudulent relations are possible, is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open, or a new one, unaffected by any settled law of the state, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith.'

"It is by no means certain that the Courts which have held a chattel mortgage wholly void in the circumstances of this case would do so now if permitted to deal with the matter originally. It is quite certain that the Supreme Court of the United States would not so hold, except as bound to do so by its rule as to following the decisions of state courts. No very good reason is assigned in any of the cases so holding, why a person should, in the entire absence of actual bad faith, lose the entire benefit of his security because of his permitting the use of part of it consisting of a distinct class of property, readily separable from the rest, in a way regarded as constructively fraudulent. Why should one, in such a matter, who is not guilty of any turpitude or of violating any written law creating a forfeiture be punished in excess of the utmost possible injury that could occur to others from the technical wrong?"

After discussing the authorities on both sides the Court stated its conclusion, at page 655, thus:

"Without further discussion it is the opinion of this court, that the effect of constructive fraud should not be extended so as to render a mortgage covering two distinct classes of property wholly void merely

because of its being void as to one of them. We are unable to see any wrong in such a transaction; one where there is an entire absence of any actual intent to commit a wrong, that should, by force of mere judicial policy, be so severely punished as by taking from the mortgagee, not only the property he did not intend to absolutely hold as security, but the other property also."

To the same effect are the following cases, each of which it is hoped and believed will be found in point and worthy of this court's perusal in case of any doubt as to the correctness of our position.

In re Kahley, 2 Biss. 383, 386.

In re Kirkbride, 5 Dillon, 116, 118.

In re Reynolds, 153 Fed. 295, 297.

In re Soudan Mfg. Co. (C. C. A. 1902)
113 Fed. 804, 809.

Lund vs. Fletcher, 39 Ark. 325, 335.

Goodhart vs. Johnson, 88 Ill. 58, 61.

Lockwood vs. Harding, 79 Ind. 129, 133.

Bullene vs. Barrett, 87 Mo. 185, 189.

Cf. 1st Nat. Bk. vs. Hamkanpf (N. M. 1911), 121 Pac. 31, 36.

Cook vs. Halsell, 65 Tex. 1, 6.

In accord with these cases are the statements of leading authorities.

Thus in *Wait on Fraudulent Conveyances & Creditors' Bills* (3d Ed.), Sec. 194, it is stated that a mortgage void in part is totally void, but this statement is qualified by the author when

he says that "where the fraud is constructive only the Court will uphold the valid provisions of the instrument if it can be done without defeating the general intent."

In Jones on Chattel Mortgages (4th Ed.), Sec. 350, et seq., the doctrine is laid down thus:

"The rule having the best support is, that a mortgage not actually fraudulent may be valid in part and void in part. * * * A mortgage covering a stock of goods and fixtures, although constructively void as to the stock of goods by reason of the mortgagor's right to continue in possession and sell them, is held binding upon the fixtures as to which the power of sale did not apply."

The leading case in support of the doctrine that the mortgage must be held void in toto is that of Russell vs. Winne, 37 N. Y. 591.

There one Woodward gave plaintiff a mortgage upon "all my flagging, curb and bridge stones; also upon my platform, gutter and coping stones, and all other stones belonging to me and all other goods and chattels now in my yard, store and docks at West Camp." The instrument contained a clause providing that the mortgagor should remain in possession and have the full and free enjoyment of the mortgaged property. At the time of giving the mortgage the mortgagor was engaged in selling stones and also kept a store. It appeared further that he sold goods from the store with the mortgagee's consent and applied the proceeds to his own use.

Upon these facts the court, at page 595, said:

“The only remaining question is, whether, if the mortgage be fraudulent as to creditors, as to a part of the property mortgaged, it can be upheld as to the residue. As applied to this case, if the mortgage be fraudulent and void as to the goods in the store, is it valid as to the store? The judge charged that it was; thus sharply presenting the point. In this, I think, he erred. The mortgage was one single instrument given to secure one debt. To render it valid, it must have been given in good faith, and for the honest purpose of securing the debt, and without any intent to hinder or defraud creditors. This cannot be true when the object, in part, or as to part of the property, is to defraud creditors. This unlawful design vitiates the entire instrument.”

It will be noticed that the court, without any reasoning or citation of authority, presumes a fraudulent intention in the mortgagee simply because of his acceptance of an instrument of grant containing a reservation of power of sale in the grantor, an argument well met by the Court in *Hayes vs. Westcott*, *supra*, when it said:

“Support is sought for it (this presumption) in the maxim which holds all men to have intended the probable consequences of their acts. This is begging the question. It is an unwarranted assumption that the act is itself evil, which it is not, in the absence of notice of indebtedness or insolvency on the part of the grantor. It assumes, also, that the probable consequence of accepting such a conveyance is that creditors will thereby be hindered, delayed, and defraud-

ed, when in truth and in fact that result would not only not be a probable consequence of accepting the conveyance from a solvent man who owed no debts, but would be an impossible consequence; and surely the law cannot and does not indulge the presumption that every man who conveys to his own use, or reserves a benefit out of the thing conveyed, is insolvent or even indebted. The presumption of an evil intent, therefore, in a grantee who accepts a conveyance of property in which a benefit is reserved cannot be indulged in the absence of some further fact than the reservation itself. Without such evil intent, the whole conveyance cannot be said to be tainted and infected; the grantee cannot be put in the category of a *particeps criminis* with the grantor, of whose bad purposes he was not advised, or even put on inquiry. The law, taking hold of the fact of the reservation in such cases, and not concerning itself with the intent, will annul it as to the property to which it pertains, when the rights of creditors are involved; but if the conveyance embraces other property which is not reserved to the grantor, but goes to the satisfaction or security of the grantee's debt, that is no constructive fraud upon other creditors. They have nothing to complain of with respect to that property, since its disposition does not hinder, delay or defeat them in any legal or just sense, unless that disposition was in consonance, and in the effectuation of, an actual or necessarily imputed evil intent, which taints the whole transaction with actual fraud."

All other cases in accord with the doctrine of *Russell vs. Winne*, *supra*, are either cases of actual fraud as distinguished from constructive

fraud or cases which practically without comment follow this case as an authority. Most of the cases, however, show actual fraud. See:

Wilson vs. Voigt, 9 Colo. 614, 619.

Holt vs. Creamer, 34 N. J. Eq. 187.

Greeley vs. Windsor, 1 S. D. 117, 122.

For a comparatively full and scholarly treatment of the question, we would respectfully refer this Court to:

Eastman vs. Parkinson (Wis. 1907), 113 N. W. 649.

Hayes vs. Westcott, 91 Ala. 143, 8 So. 337.

Jones on Chattel Mortgages (4th Ed.), Sec. 450, et seq.

In addition to the purely legal questions it may not be amiss to speak briefly of the facts in this case.

It will be noted, in the first place, that though the mortgage speaks of "all of the property owned" by the mortgagor, this general language is later limited by the words "consisting of machinery, tools, equipment, supplies, office furniture, fittings and safe," so that the rule applies that words of general import are limited by accompanying words of limitations.

Furthermore, though the minutes of the corporation show that authority was given to mortgage everything, the parties omitted the stock of goods and manufactured pumps then on hand, or to be made thereafter. In truth there is noth-

ing mentioned in the mortgage analogous to a stock of goods, except perhaps the word "supplies." What that word means it is difficult to say.

If it be granted that the word refers to the raw materials from which the company made its pumps, what is the court going to do? Is it going to say to Mr. Peterson: "You, Mr. Peterson, have been guilty of a fraud, you have acted in a villainous manner, you have tried to injure the creditors of this company by giving the corporation money with which to pay them all off, and as a penalty and punishment for this grievous wrong this court will declare that your fraud has so permeated and tainted the whole transaction that it must in justice to the creditors hold the mortgage void, not merely as to the supplies, but also as to the machinery, tools, equipment, office furniture, fittings and safe."

In conclusion, we ask, is it not more consonant with reason, with justice, with the precedents, with wholesome business common sense for this court to say as a matter of law:

(1) That the supreme court of Oregon has not decided whether or not a chattel mortgage is void in toto simply because of constructive fraud as to a part thereof.

(2) That in the absence of an authoritative decision to that effect clearly binding this Court, it is declared to be the law that a mortgage may

be void in part for constructive fraud and valid as to the residue; and

(3) That a chattel mortgage covering a stock of goods and fixtures, given and received in good faith, with power of sale as to the stock of goods reserved in the grantor, together with the right to the proceeds, is, as to creditors of the mortgagor, void as to the stock of goods and valid as to the fixtures.

It is believed that such is the present status of the law in the state of Oregon.

Respectfully submitted,

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of Counsel.

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In the United States Circuit Court of Appeals

For the Ninth Circuit

J. H. PETERSON,	Petitioner and Appellant,
vs.	

R. L. SABIN, as Trustee of the Estate of Rohrbacher Automatic Air Pump Com- pany, a Corporation, Bankrupt,	Respondent and Appellee.
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In the Matter of Rohrbacher Automatic Air Pump
Company, a Corporation, Bankrupt.

BRIEF OF RESPONDENT AND APPELLEE.

CORRECTION OF APPELLANTS' STATEMENT OF THE CASE.

Before entering into a discussion of the legal phases of the question involved in this litigation, it is believed to be wise to correct a few erroneous statements contained in the statement of facts set forth in various parts of appellant's brief.

It is stated, on pages 1 and 2 of said brief, that the funds for which the mortgage was given as security, were advanced to the bankrupt by the appellant, J. H. Peterson, with the understanding that the sum advanced would pay off all the debts of the bankrupt company.

No such facts are contained in the stipulation, which constitutes the entire evidence in this case, nor did it so appear in the evidence on which the stipulation was based.

On page 7 of appellant's brief, it is stated that at the time the loan was given, J. H. Peterson, the appellant, had no occasion to surmise that the company was insolvent, and that in fact the company was not then insolvent.

Neither of these facts is contained in the stipulation. The statement as to surmise may be true, although it did not so appear in the evidence, and therefore cannot be taken as the fact, but the statement that the company was not insolvent at the time the loan was made is neither true in fact nor does it so appear in evidence.

And it is stated on page 30 of appellant's brief that though the minutes of the corporation show authority was given to mortgage all the assets of the corporation, the parties omitted from the mortgage the stock of goods and manufactured pumps then on hand or to be made thereafter.

Neither the evidence nor the mortgage shows that the parties omitted anything therefrom, in fact, the mortgage states specifically that it covers "all the property owned by the party of the first part" (Transcript, page 17), and the stipulation, paragraphs V and VI (Transcript, page 15), not only negatives the fact that anything was omitted from the mortgage, but clearly shows that the entire floating stock of supplies and pumps were included in the mortgage.

With the above exceptions, the facts as stated in the appellant's brief are correct, and while these erroneous statements, even though they were true, cannot in any way affect or alter the situation, yet it is believed to be better that the exact facts be properly before the court.

SOLE QUESTION TO BE DECIDED.

Counsel for appellant have fairly stated in their brief the sole point to be determined by this Court, but for purposes of accuracy the question may be slightly differently restated here.

Where a chattel mortgage is given covering a shifting stock of goods, and likewise property not shifting, but of a stationary character, and the possession of the entire property is allowed by the terms of the mortgage to remain in the possession of the mortgagor, the mortgagor being given at the time the mortgage was executed unlimited power of disposition and sale of the shifting stock of goods, without accounting to the mortgagee, is such a mortgage, admittedly fraudulent under the laws of the State of Oregon, void not only as to the shifting stock of goods, but likewise void as to the property not shifting?

ARGUMENT AND AUTHORITIES.

Counsel for respondent is in accord with counsel for appellant in the statement that no case has arisen in Oregon where the facts affirmatively show that the mortgage is given upon a shifting stock of goods, and likewise upon property not shifting, possession of all of said property being permitted to remain with the mortgagor, who, at the time the mortgage is given, it is agreed may have unlimited power of disposition and sale of the shifting stock of goods without accounting to the mortgagee, in which, under such a state of facts it is held specifically, and in so many words by the Court, that the mortgage is void both as to the shifting stock and as to the stationary property, where there appeared in said case no element of actual positive fraud, involving an active and purposeful design on the part of the parties to defraud the creditors.

While admitting this limitation as to the nature and extent of the Oregon cases, we do, however, earnestly insist that no other interpretation can be placed upon the language used by the Oregon court in the decision of the various cases which have come before it, than that a mortgage void because of fraudulent reservation as to a portion of the property, is also invalid as to other portions of the property not thus fraudulently reserved.

OREGON DOCTRINE.

A discussion of the Oregon cases on this subject is advisable so that the status of the doctrine adopted in Oregon as to mortgages on merchandise, with power of sale in the mortgagor, may be clearly determined, inasmuch as the Federal Courts will look primarily for guidance to the decisions in this particular state.

In the case of *Orton vs. Orton*, 7 Ore. 498, it is held that when it appears either on the face of a chattel mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor unlimited power to dispose of the property mortgaged, for the use of the mortgagor, the *mortgage* is void as to purchasers and attaching creditors.

In the case of *Jacobs Bros. & Co. vs. Irvin*, 9 Ore. 52, the Court holds that where, upon the execution of a chattel mortgage on a portion of a stock of goods in the store of a retail merchant, there is a verbal agree-

ment between the parties that the mortgaged goods shall remain in the mortgagor's possession and form part of his stock in trade, and that he shall have full power to sell and dispose of the same in the usual course of his business, such *mortgage* is fraudulent and therefore void as to the creditors of the mortgagor.

In *Bremer & Co. vs. Fleckenstein & Mayer*, 9 Ore. 266, which is the leading and authoritative case principally cited for the doctrine in Oregon, it was held that a chattel mortgage is void where there is an agreement between the parties, allowing the mortgagor to continue in possession of the mortgaged chattels with power to sell and dispose of portions of the same for his own benefit in the usual course of trade, for the reason that, *irrespective of the actual intent with which the mortgage was entered into*, the effect thereof is so pernicious as to stamp it as fraudulent, and the parties must be presumed to have so intended. Says the Court, on page 273 of the opinion:

“We regard it as settled doctrine here that an agreement of that character (as above outlined) between the mortgagor and the mortgagee at the time the mortgage is given, renders the *mortgage* (italics ours) fraudulent and void as to other creditors of the mortgagor . . . Here, then, we find Haas (the mortgagor), after the execution of the mortgage to appellants, carrying on his business in the same manner as before, selling off the mortgaged stock in trade, and

paying his own expenses, and keeping up his stock by fresh purchases out of the proceeds of such sales, rendering no account to the holders of the mortgage, and in reality under no more restraint than if it had not been in existence. And yet its obvious effect was to ward off its other creditors, and hinder and delay the collection of their demands against him, and the appellants must be presumed to have so intended. We have no hesitation in declaring that such an arrangement was a fraud upon the other creditors, and cannot be upheld."

The case of *Aiken vs. Pascall*, 19 Ore. 493, follows the previous case, in holding that when it appears either on the face of a chattel mortgage or by parole evidence that the mortgage of personal property has given to the mortgagor power to dispose of the property mortgaged, and to apply the proceeds to his own use, the mortgage is void, since the fact that the mortgagor was permitted to treat the goods as his own, and to sell and appropriate the proceeds stamps it as fraudulent.

In *Fisher vs. Kelly*, 13 Ore. 1, 14, it is said:

"When it appears from extrinsic evidence that the mortgagor is to remain in possession of the goods mortgaged, and sell the same in the usual course of business, *the mortgage is fraudulent in fact* (italics ours) for the reason that it is for the mortgagor's own use and benefit, and

comes within the inhibition of Section 3053, Hill's Code, which declares all transfers of goods and chattels made in trust, for the person making the same shall be void as against the creditors existing, or subsequent, of such person," and citing the cases above mentioned.

In *Sabin vs. Wilkins*, 31 Ore. 450, 456,—L. R. A. 465, opinion by Judge Wolverton (then Associate Justice of the Supreme Court of Oregon), from whose decision the present case is appealed, it is said:

"It has been decided in this state that when it appears, either upon the face of the mortgage or by parole evidence aliunde, that the mortgagee of personal property has given the mortgagor unlimited power and authority to dispose of the property in the usual course of trade for his own use and benefit, the *mortgage* (italics ours) is void as to attaching creditors."

And the Court, further discussing the matter, says, in substance, that whether the objectionable agreement appears in the mortgage or whether made by independent agreement, expressed or implied, either at the time the mortgage was entered into or subsequent thereto, the mortgage is thereby converted into an instrument for the benefit of the mortgagor, and is fraudulent and void from the time such purpose is promoted.

In *Gregg vs. Mueller* (Oregon), 133 Pac. 94, the latest (1913) case decided upon the question in Oregon, the doctrine of the cases above outlined, is followed and approved. In this case a mortgage was given upon a shifting stock of goods as well as upon other property not shifting, and the mortgagor was permitted to remain in possession of the property, and to sell the shifting stock without accounting for the proceeds, although the mortgage required him thus to account, and the court held that the mortgage was fraudulent and void as to both the stock and fixtures. It is true in this case that the element of actual fraud on the part of the mortgagor was present, but it is maintained that the court propounds the following principle of law as applied to chattel mortgages of this character in Oregon:

That a mortgage on a stock and fixtures, where possession of the property remains in the mortgagor, with power of disposition in the mortgagor to dispose of the stock in the usual course of trade, is void; that is, the *mortgage* is void, but if the mortgage contains a provision for an accounting to the mortgagee with application of the moneys in payment of the debt secured, the mortgage is then valid, *provided* such provision for an accounting is made in good faith, and no laches occurs on the part of the mortgagee. If, however, the provision for accounting is not in good faith, or there be laches on the part of the mortgagee, then the mortgage is void in spite of its valid form.

As has been stated, the court held in this case that

though the mortgage on its face was a valid mortgage, and provided for an accounting, yet the mortgagee, by reason of his laches, permitted the mortgagor to neglect to account for the proceeds, and thereby converted the mortgage into a mortgage for the benefit of the mortgagor, which raised the indisputable presumption of fraud.

Now, it is contended that none of the Oregon cases, from *Orton vs. Orton*, to *Gregg vs. Mueller*, makes any distinction as to the property conveyed, but all of them hold that the *mortgage* is void. And this is particularly true in the latest case of *Gregg vs. Mueller*, where both shifting stock and stationary property were involved, yet no distinction was made in the entire opinion as to the nature of the *property* involved, the whole discussion being as to the *mortgage* itself, as to whether the *mortgage* was valid, or the *mortgage* void.

We, therefore, take issue with the statement of counsel for appellant that the Oregon court has not decided that a mortgage void in part is void in toto, and that the question in the case at bar is an open one in Oregon.

The Oregon court has never decided that a mortgage upon the circumstances here set forth could be void in part only. The language of every opinion in all cases coming before the Oregon court on this subject, treats the mortgage as an entity, and not so susceptible of division into parts, and while it is admitted that there is no language in the Oregon cases stating specifically and explicitly that a mortgage void in part is wholly

void, in cases of this particular character, yet there has been no occasion for such a statement, and the language used in the cases which did arise and which have been referred to, is such that no other interpretation can be placed upon it than that herein urged.

However, conceding, for the purpose of argument, that the Oregon court has not decided this question, and that the question is an open one in this state, we will proceed to examine the authorities in other states, and insofar as can be ascertained, the basis for the respective decisions on the general subject.

DOCTRINE IN OTHER STATES.

It may be premised that the courts of the various states which have passed upon the question now at issue, are not harmonious, some holding that though the mortgage be void, as to the shifting stock, because of a provision allowing the mortgagor to retain possession of the shifting stock of goods with absolute power of disposition and sale without accounting, yet as to other property contained in the mortgage not of a shifting character, concerning which no power of sale is given, it may be valid. The states holding the doctrine "void in part not necessarily void in toto" are: Alabama, Illinois, Indiana, Montana, Wisconsin, and possibly Texas.

The states holding the reverse of the proposition, namely, that a mortgage void in part is void in toto,

disregarding Oregon for the present, are: Colorado, Kansas, Minnesota, Mississippi, Missouri, New Jersey, New York, South Dakota, Tennessee and West Virginia.

BASIC PRINCIPLE UNDERLYING THE CASES.

Attention is directed first to the states apparently sustaining appellant's contention, and here it should be first particularly noted that in these states the doctrine does *not* prevail, as in Oregon, that a mortgage upon a shifting stock of goods *only*, where the possession is permitted to remain in the mortgagor, who is given unlimited power of sale either under the terms of the mortgage or by collateral agreement, expressed or implied, is *fraudulent per se* and as a matter of law, but rather that the intention is to be determined as a matter of fact. (This statement should be qualified as to Alabama, in which state the doctrine has been modified subsequently, however, to the time of the decision of *Hayes vs. Westcott*, quoted in Appellant's brief. At the time of said decision the cases required that the intention be shown as a matter of *fact*.)

This distinction is believed to be of importance and stress is particularly laid thereupon. It will be observed here that the question of void in part, void in toto, or not, is not in anywise involved, excepting as the conclusion of the particular court is affected by the radical

difference in the governing principle. In the discussion of this question by the courts the lien is co-extensive with the power of sale. It is not questioned by Appellant that the Oregon decisions unanimously and strongly insist that where all the stock is shifting and the mortgagor is left in control the mortgage is *void*, not *prima facie*, void, but *absolutely* void, whereas, we will show that the courts of the states cited as favorable to Appellant do not invoke or apply this well-established principle of the law of mortgages in Oregon.

ALABAMA

At the time of the decision of *Hayes vs. Westcott*, 91 Ala. 143, 8 Sou. 347, the Alabama courts held that such a mortgage was not void in the absence of an *affirmative intent* in the mortgagor to hinder, delay and defraud his creditors.

Thornton vs. Cook, 97 Ala. 630, 632.

Howell vs. Carden, 99 Ala. 101, 111.

Goetter vs. Norman, 107 Ala. 585, 595.

Troy Fertilizer Co. vs. Norman, 107 Ala. 667, 681.

ARKANSAS

The courts of Arkansas also hold it to be necessary to show an actual fraudulent intent, even though all the property pledged be shifting, and the possession thereof is left in the mortgagor with unlimited power

of sale without an accounting. Jones on Chattel Mortgages, 5th Edition, paragraph 383-a, states as follows the result of the Arkansas decisions in this regard:

“The mortgagor’s possession of the mortgaged merchandise, with power of disposition seems, however, to be not conclusive of fraud, but only evidence of it. These circumstances render the mortgage void if they are not explained. The question of fraud is still one of fact for the jury, and not a conclusion of law.”

Morton vs. Ogden, 41 Ark. 186.

Fink vs. Ehrman, 44 Ark. 310.

Gauss vs. Doyle, 46 Ark. 122.

ILLINOIS.

And so in Illinois, in the case of Goodhart vs. Johnson, 88 Ill. 61, cited by appellant, it is said:

“As to the question of fact, the intention of the parties in the making of the mortgage, whether honestly and in good faith, to secure the payment of an indebtedness . . . or to hinder or delay creditors, that was for the court below, upon which all the evidence we have considered would be ^{pertinent} ~~burdened~~, and the finding of the court thereon we do not see sufficient reason to disturb.”

See also to the same effect Barnett vs. Fergus, 51 Ill. 352, cited by appellant.

INDIANA.

And likewise in Indiana, in *Lockwood vs. Harding*, 79 Ind. 129, 133, also cited by Appellant, it is stated that the question of fraudulent intent is made by statute in Indiana in all cases a question of fact.

“The case will be rare, indeed, in which it can be said as a matter of law that a chattel mortgage is void upon its face.”

WISCONSIN.

And in Wisconsin, in the case of *Eastman vs. Parkinson*, 133 N. W. 649, it is stated that no intent to defraud can be inferred. Says the Court:

“It may well be that the mortgagor was allowed to remain in possession of the mortgaged property, and to use some of the stock in trade, as it had theretofore used the same until claimed by the mortgagee; and there not having been any specific agreement to that effect, or, in case of an agreement, an intent to defraud, such conduct, unexplained, is evidence of fraud, but not necessarily conclusive of it.”

TEXAS.

And in Texas, the court likewise holds that such a provision in the mortgage does not make it fraudulent in law.

Jones on Chattel Mortgages, Sec. 407.

MONTANA.

It is difficult to arrive at a correct understanding of the decisions in Montana, but it is not necessary for our purposes, since in Montana (and likewise also, for that matter, in Wisconsin), a statute hereafter to be referred to in discussing the decision in that state, qualifies the situation.

DOCTRINE OF OREGON AND OTHER STATES.

In most of the other states with which we are concerned, however, in accord with the doctrine enunciated by the Supreme Court of Oregon, a chattel mortgage is pronounced *conclusively fraudulent in law*, irrespective of actual intent, where the mortgagor is allowed to retain possession of the property mortgaged, with unlimited power of disposition and sale thereof without accounting.

Bremer vs. Fleckenstein & Mayer, 9 Ore. 266.

Wilson vs. Voight (Colo.), 13 Pac. 726.

Bank of Rome (Tenn.) vs. Haselton, 15 Lea.
216.

Gallagher vs. Rosenfeld, 47 Minn. 504.

Cook vs. Bennett, 60 Hunn. N. Y. 8.

Hangen vs. Hachemister, 114 N. Y. 266, 21
N. E. 1046.

Greeley vs. Winsor, 1 S. Dak. 618, 48 N. W. 214, 45 N. W. 325.

Garden vs. Bodwing, 9 W. Va. 121.

One of the best discussions of this doctrine and the reason therefor, ²⁵~~is~~, perhaps, presented in the case of Bank of Rome vs. Haselton (Tenn.) 15 Lea. 216. There the Court says:

“In Bank vs. Ebbert, 9 Heis. 153, the mortgage contained an express reservation that the debtor, without bond, should keep possession of the stock of merchandise (Liquors), and carry on the business, selling and buying just as before the deed, and the trustee should take possession only on default of payment of the note first due. For this reason the deed was declared void, because, ‘although there was no specific intent to defraud any particular creditor, or no actual fraud in fact, yet there are such *facilities for fraud* contracted for on the face of the deed that it must be held wanting in legal good faith . . . There is a benefit contracted for to the grantors on the face of the deed, and a prejudice to the rights of other creditors, in being able to keep their stock in trade covered up from execution, or attaching creditors, while they continued to use the same in defiance of their demands for profit, and with the means of appropriating the proceeds to their own use.’

“This case is disputed as a precedent for the present case, since no benefit or facility for fraud is *contracted for on the*

face of this deed, there being no special stipulation in it that the debtor shall remain in possession and carry on the business of merchandising until the default. This distinction is obvious. Does it affect the result?

“In the *Ebbert* case, the court, following *Twynne's* case, wherein the sale was held void, because the debtor ‘continued in possession of the goods and used them as his own; and some of them he sold; and he shorn the sheep and marked them with his own mark,’ adhered to the old doctrine of liberal exposition and application of statutes ‘to prevent fraud, which doth so much abound in these days,’ and announced as the basis of decision in that case, ‘that any conveyance that puts the property of the debtor in the name of a third party, so far as the legal title goes, and leaves it in his possession, and under his control, with the right to continue to use it in trade, sell and dispose of it as before the conveyance, lacks the essential elements to sustain such a conveyance as against a creditor.’

“And in the well considered case of *Phelps vs. Murray*, 2 Tenn. Ch. Rep. 746, in which the leading cases were reviewed and analyzed, Judge Cooper held that the conveyance, which was ‘of our entire stock of goods . . . now in our store . . . and any other goods which may, during the existence of this mortgage, be purchased by the grantors and put into the store,’ being of that class where ‘a mortgage lien is sought to be created on personal goods, the only profitable use of which is as articles of com-

merce, and an unlimited power of disposition is reserved, was invalid at law and not enforceable in equity,' upon the ground that such a transaction, irrespective of fraud, is *against public policy*, throwing open too wide a door for possible fraud.'

"* * * In the present case it is obvious that it was intended by Montague and Manager Stone, that the debtors should so use the goods; though the power of sale is not expressly contracted for, it is plainly implied; and the deed was so construed and acted upon by the parties, and was thus as efficient for advantage to the debtor and injury to the other creditors, as though the right had been expressly contracted for.

"Though the parties may have been honest in their intentions, it is obvious that at the time of making this mortgage, it was understood between the parties to it that the mortgagor should retain possession of the goods and keep open the store and retail the same after the mortgage just as before. *It is this intention to allow the mortgagor the right of disposition*, whether that intention appear on the face of the deed, or by express oral declaration of the mortgage, or is inferred from the relation and conduct of the parties, which, in the opinion of the majority of the Court (Judges Freeman and Cooper dissenting), *stamps the mortgage as void*; Pierce on Mortgages of Merchandise, Ch. III. And being void as to the merchandise, it is settled by our decisions to be void as to all the property embraced in the mortgage. Simpson vs. Mitchell, 8 Yer.

419; *Richmond vs. Crudup, Meigs, 581; Trabue vs. Willis, Id. 584.*" (Italics ours.)

It will, therefore, be seen that the mortgage is pronounced fraudulent and void, not because of any guilty intent or any malicious design on the part of the mortgagee, but because of the harmful effect of such a provision upon creditors, and because it is bad public policy to encourage such mortgages. In other words, the mortgage in these states is declared void, *not* for the purpose of *punishing* the mortgagee, but for the purpose of *protecting* creditors and upholding the policy of the law.

In the other states which do not hold that a mortgage is fraudulent per se because of such provisions as those under discussion, the erroneous impression seems to prevail in the decisions that the basis for declaring such a mortgage void is punishment of the mortgagee, the result being that when a mortgage is given upon stock shifting, and stationary property, with power of disposition ^{as to the former,} in the mortgagor without accounting, these decisions seem to conclude that the purpose of punishment is sufficiently accomplished by holding that the mortgage is void as to the stock concerning which there is a provision for sale, and that there is no need for extending the punishment upon that portion of the property which is not allowed to be disposed of by the mortgagor during the existence of the mortgage.

It will thus be seen that much of the criticism con-

tained in the citations in appellant's brief is based upon reasoning from false premises, and the value of the criticism as well as of the conclusions expressed in these citations is not apparent. The basic principle, to which we have endeavored to call attention, is in these citations entirely overlooked or mistated.

DOCTRINE OF VOID IN PART, VALID IN PART.

Now, proceeding to a discussion of the cases holding that a mortgage of the character under discussion void in part may be valid in part, it will be seen that none of the cases adopt the doctrine of "*fraud per se*," but merely hold that such a provision is a "badge of fraud," and that *actual* intent to defraud the creditors must be shown. True, such provision is held by some of these cases to be evidence of fraud, but the provision of itself does not preclude evidence of good intent, nor will it justify the court in holding as a matter of law that there is fraud. Nor, unlike Oregon, do any of these cases hold that it is against public policy to permit such a provision, in fact, some of them, unlike Oregon, expressly state that the provision in itself is not against public policy, hence in most of these cases the theory is indulged in that the mortgage itself, when executed, is a valid mortgage, and that the permission to allow the mortgagor to continue in the use of the property with unlimited power of sale without an accounting is a waiver of the lien by the mortgagee upon

the property upon which the power of sale is permitted, if the provision amounts to fraud. In other words, the lien of the mortgage is withdrawn from so much of the property as is within the power of sale. If it be given as to all the property included in the mortgage, then these courts hold, fraud being found, that the lien of the entire mortgage is waived and that the entire mortgage is therefore void, and that if the property upon which the power of sale is given is only a part of the mortgaged property, then the lien is waived as to so much of the property upon which the power of sale is given, and as to that property the mortgage is void, but as to the balance of the property upon which the power of sale is not given, the lien is not waived and the mortgage as to such property is valid.

Now, discussing the individual cases cited by appellant from the various states, with reference to the void in part, valid in part, holding:

ALABAMA.

Hayes vs. Westcott, 91 Ala. 143; 11 L. R. A. 488, 490.

All of the elements suggested above are present in this case:

Firstly, the decision is permeated with the idea that the reason of the doctrine of the orthodox decisions, that a transaction of the character under discussion is fraudulent and void in toto is to punish the mortgagee.

Secondly, it holds, unlike Oregon, by its reasoning that such a conveyance is *not* against public policy.

Thirdly, the theory upon which the decision is based is that the mortgage when given was *valid*, and that the invalidity thereof applies only to such property concerning which the mortgagor is given the power of sale; in other words, it assumes that the *mortgage* is valid in its inception; that the *intent at its making* does not vitiate the mortgage, but that the *dealing* with the property under the mortgage by the parties thereto invalidates the mortgage after it is made as to such property concerning which the fraudulent intent is found.

The case has been quoted at such length in the brief of appellant that the language of the court need not here be set forth. Reference is made to the brief of appellant, pages 18-20, and pages 28-29, for extracts from the decision, which extracts we think sufficiently illustrate the misapprehension as to which we have adverted.

ARKANSAS.

Lund vs. Fletcher, 39 Ark. 325, 335.

In this case there is no discussion of the principle involved, the court merely saying that the mortgage was good as to the articles included therein not intended for sale.

In re: *Reynolds* (Ark.) 153 Fed. 295, 297.

Here, the Federal Court, without discussion of the principles, states that the case of *Lund vs. Fletcher*, being a decision of a court of last resort in the state in which the mortgage was given, it would be required to follow said decision, but the case decides that the mortgage is void in toto under section 60 of the Bankruptcy Act. The question, therefore, as to the validity of the mortgage in part not being before the court, was not decided.

ILLINOIS.

Barnett vs. Fergus, 51 Ill. 352.

It is apparent that the Illinois court also labors under the same mistaken view of the principle involved as that which vitiates the reasoning of the Alabama court in *Hayes vs. Westcott*. Particularly is this so as to the theory concerning the validity of the mortgage at its inception, and the waiver of the lien by permitting the mortgagor to continue in the possession of the property with unlimited power of sale. In that opinion, the court, after using the language cited on pages 21 and 22 of appellant's brief, continues:

"The utmost that could be said to his (the mortgagee's) injury, would be that where the bona fides of the mortgage comes in question, the fact that he has permitted the mortgagor to use the goods in a manner inconsistent with his own rights as a mortgagee, is a circumstance which a jury would have a right to consider in determining the question whether the mortgage was originally made to defraud

creditors, and is therefore equally void as to both goods and horses. The degree of weight to be given to this circumstance would, of course, greatly depend upon the other evidence in each case. Taken by itself and with no circumstances to throw discredit upon the mortgage, it would merely show that the mortgagee had consented to release the goods from the lien of his mortgage, thereby impairing his own security to that extent, but would by no means justify the inference that he intended to abandon his lien upon the horses.

Applying these principles to the case at bar, we do not find it difficult of decision. The mortgage covered the printing press and its appurtenances, and certain books and blanks which had been printed by the mortgagor, and which were held by him for sale. The evidence shows he continued, with the knowledge of the mortgagee, to sell these books and blanks in the same way after as before the mortgage was made. As to these the other creditors had a right to insist the lien of the mortgage, as against themselves, was lost. But not so as to the printing press and its appurtenances. The mortgagee had consented to nothing, in regard to that portion of the property inconsistent with his position and rights as mortgagee. He had a right to *relinquish* his lien upon the books without losing that upon the press, and such relinquishment is, of itself, but very slight evidence of a fraudulent intent in making the mortgage." (*Italics ours.*)

INDIANA.

Davenport vs. Foulke, 68 Ind. 382.

The decision in this case was based on the grounds that the mortgagee had waived his lien as to all the property; however, the court approves (*obiter dicta*) the decision in the case of *Barnett vs. Fergus*, 51 Ill. 352. (See brief of appellant, page 21). Since that Illinois case has been discussed nothing need be repeated here concerning the same.

Lockwood vs. Harding, 79 Ind. 129, 133.

In this case, also cited by appellant, while the question did not arise, the decision being upon demurrer to a complaint and the demurrer being sustained, and the whole mortgage held valid, yet the court here indulges in *dicta* also, and states the doctrine that a mortgage of the kind under discussion may be void in part, yet valid in part.

In re: *Soudan Mfg. Co.*, (Ind.) 113 Fed. 804, 809.

This case, arising under the laws of the state of Indiana, the Federal Court, in deciding the question as to whether a mortgage of the character under discussion may be void in part and valid in part, holds that the Indiana law as interpreted by the courts permits a mortgage to be held valid in part although void in part.

Rochelear vs. Boyle, 11 Mont. 451; 28 Pac. 872.)

MONTANA.

The same theory pervades in this case. The decision, however, is not without some complication of language. It seems that the mortgagor was allowed to remain in the possession of the property with unlimited power of sale as to the stock and the fixtures, but the possession of the stationary property (if the court considered it in the possession of the mortgagor at all), was under the eye and supervision of the mortgagee. It also appears that the Supreme Court of Montana had formerly held in the case of Leopold vs. Silverman, 7 Mont. 262, that a mortgage upon a shifting stock of merchandise, where possession was allowed to remain with the mortgagor who was given unlimited power of sale, was void in law. In the present case, however, the court evidently regrets its former decision, and in fact practically overrules it, stating inferentially that such a provision in itself, unless there is evidence of bad faith or active evidence of an intention not to apply the proceeds to the mortgage indebtedness, is *not* void.

At any rate, the decision in this case is based upon a *statute* in Montana which provides that no mortgage of goods shall be valid except as to the parties, unless the possession of such chattels be retained by the mortgagee, or the mortgage itself provides that the mortgagor may remain in possession and be accompanied by an affidavit that the same is made in good faith without design to hinder or delay the creditors, which mort-

gage and affidavit are required to be recorded. The court then holds that this requirement of the statute in this case was not complied with as to the stock of goods, and that therefore the mortgage is ineffective as to said stock of goods, but specifically avoids holding that the mortgage for that reason is impliedly fraudulent even in part, saying:

“But after due consideration, we do not regard the case as involving the question of fraudulent intent to be found by applying the principles of constructive fraud or fraud in law, so much as the question whether or not the parties by the conditions which they entered into or sanctioned by their conduct made, or failed to make, a valid mortgage as to the whole or part of the property intended to be covered by the mortgage lien, or having made a good mortgage so far as shown by the terms of the instrument, by mutual agreement, understanding or permission, the parties annulled such essential condition of the mortgage as to the whole or part of the property mentioned.”

And further, that:

“It may be found without reference to the question of fraud, that the parties fell short of making a mortgage, or having made one that they nullified it as to the whole or part of the property by other agreement, understanding, or permission touching the same.”

The court then holds that as to the property of a

stationary character on which there was no power of sale, and upon which it must be assumed that the mortgagee had control, the lien of said mortgage was effective.

TEXAS.

Cook vs. Halsell, 65 Tex. 1, 6.

In the above case no discussion is had concerning the question, but a mere short statement appears that the mortgage is valid as to the stationary property.

WISCONSIN.

Eastman vs. Parkinson, 113 N. W. 640, 13 L. R. A. (N. S.) 921.

The Wisconsin court in this case furnishes a good illustration of the attitude of the courts holding the view that a mortgage such as under discussion may be valid in part, though void in part. That the court assumes that one of the reasons for the courts of other states holding the mortgage void in toto where void in part is one of punishment, may be seen from the following language used by the court:

“Why should one, in such a matter, who is not guilty of any moral turpitude, or of violating any written law creating a forfeiture, be punished in excess of the utmost possible injury that could occur to others from the technical wrong.

“We are unable to see any wrong in such a transaction; one where there is an entire absence of any actual intent to commit a wrong, that should, by force of mere judicial policy, be so severely punished as by taking from the mortgagee, not only the property he did not intend to absolutely hold as security, but the other property also.”

Likewise, the court does not approve (in the absence of actual intent to defraud), of the Oregon theory that it is against public policy to hold a mortgage void where the possession of property with unlimited power of disposition is left with the mortgagor without accounting.

It may be concluded, therefore, that in all the states which have held that such a mortgage may be valid as to stationary stock over which there is no power of sale, yet void as to shifting property over which there is a power of sale in the mortgagor, the reason, where any reason is assigned, is based upon the doctrine that an agreement permitting the mortgagor to retain possession of chattels with unlimited power of sale without an accounting, is not necessarily against public policy, nor void per se, and these courts are becoming more and more insistent upon the requirement that an intent to defraud creditors be actually shown in such cases. True, they assume that certain conditions make a *prima facie* case, yet they allow evidence of good faith to be shown and some of them, by statute, are satisfied

with the requiring of an affidavit to the fact that the mortgage is executed in good faith. And there is but a slight step from this position to the holding that where *prima facie* fraud only is established as to the property which the mortgagor is permitted to sell, that the mortgage is valid as to property upon which there is no such power of sale.

And these courts, thus holding, criticise, as we have pointed out, upon a false premise, the other courts which hold differently. They assume that the courts which, like Oregon, hold that the mortgage is void in toto, base their reasoning upon the idea of a *punishment* to the mortgagee for having permitted a fraudulent act.

That appellant, likewise so misapprehends the doctrine of the Oregon and other courts holding similarly, and shares in the non-existent "punishment" theory ascribed to the Oregon doctrine, by the Alabama, Illinois, and other cases cited by him, is well illustrated by the "poser" which appellant propounds to this court in his brief (page 31):

"Is it (referring to the Circuit Court of Appeals) going to say to Mr. Peterson: 'You, Mr. Peterson, have been guilty of a fraud, you have acted in a villainous manner, you have tried to injure the creditors of this company by giving the corporation money with which to pay them all off, and as a penalty and punishment for this grievous wrong this court will declare that your fraud has so

permeated and tainted the whole transaction that it must in justice to the creditors hold the mortgage void, not merely as to the supplies, but also as to the machinery, tools, equipment, office furniture, fittings and safe."

Of course, this assumption is not a correct one. The reason that the mortgage is held void in toto in Oregon and other states is because, for reasons of public policy, it is presumed conclusively that such mortgage was made with the intention to defraud the creditors, and the mortgage having been fraudulently entered into is void because of the intent with which it was entered into; in other words, these courts hold that the mortgage is void *ab initio*, and the idea that a *mortgage* thus *void*, may be valid in any particular is incongruous.

Now, taking up a discussion of the courts holding the doctrine which may, for the purpose of convenience, be denominated the doctrine of

VOID IN PART, VOID IN TOTO: COLORADO.

Wilson vs. Voight (Col.) 13 Pac. 726

Brasher vs. Christophe (Col.) 15 Pac. 403, 409

Harbinson vs. Tufts (Col.) 27 Pac. 1014, 1015

Roberts vs. Johnson (Col.) 39 Pac. 596, 599.

Dodge vs. Norlin (Col.) 113 Fed. 363, 370

Says the Colorado court in *Wilson vs. Voight*, *supra*:

“The fact that other property besides merchandise was included in the mortgage, does not affect the result. There are cases which hold that such an instrument may be void in part and in part valid, but we are inclined to accept and apply the doctrine, elsewhere announced, that if the mortgage be void as to a portion of the property mentioned therein, it is void altogether. It is the *agreement to sell*, retaining the proceeds, or the *act of selling* with the mortgagee’s consent, and retention of the proceeds, that invalidates the transaction. Whether this agreement or this act relates to one part of the property mortgaged or another is a matter of little significance. In a case like the one at bar, where there is no express agreement, why should the mortgage be held good as to the fixtures but void as to the goods remaining unsold? It may be that had things remained in *statu quo* and Voight returned, he would have proceeded to sell the fixtures. If, under a contract providing for the sale of merchandise, the mortgage may remain valid as to fixtures and other property, it should follow that when the contract related to a particular line of goods, or a particular part of the stock, the mortgage would remain unassailable as to the rest of the wares and commodities . . . There will, in our judgment, be less confusion, and in the end less real injustice, by adhering to the rule that if the mortgage is, upon this ground, void in part, it is wholly void.”

And in the case of *Brasher vs. Christophe*, *supra*, the court, after quoting the language of *Wilson vs. Voight*,

as set forth above, makes the following additional comment:

“The agreement to sell invalidates the mortgage as to creditors and incumbrancers, and this effect takes place at the moment of delivery of the instrument. It is not necessary to this effect that any of the property be sold under the power. The transaction is vitiated *ab initio*, as to all the property upon which it is attempted to create a lien, by the reservation of such right, and not by the exercise of it.”

MINNESOTA.

Horton vs. Williams, 21 Minn. 187.

Gallagher vs. Rosenfield, 47 Minn. 507, 511; 50 N. W. 696.

Says the court in the last mentioned case, at page 511:

“It is insisted by the defendant that since by the terms of the mortgage the mortgagor is only authorized to sell the stock in trade, the mortgage, thought void as to the liquors and cigars, is valid as respects the fixtures and other property to which the license to sell did not extend. The better opinion supported by *Horton vs. Williams*, 21 Minn. 187, is that the entire instrument is vitiated by the *fraudulent provision*, as to a part of the goods. *Russell vs. Winne*, 37 N. Y. 591. *Holt vs. Kremer*, 34 N. J. Eq. 181. *Mead vs. Combs*, 19 N. J. Eq. 112. *Wallach vs. Wylie*, 28 Kan. 97. The unlawful design

permeates the mortgage . . . The transaction must be considered as a whole . . . This is the only sound and safe rule. Wait on Fraudulent Conveyances (2d Ed.) Paragraph 434. ^{Bump} (??) on Fraud. Conv. (3d Ed.) page 487."

MISSISSIPPI.

Burk vs. Murphy, 27 Miss. 167, 187-188.

Harmon vs. Hoskins, 56 Miss. 142, 149.

Andrews vs. Partee, 79 Miss. 80, 84; 29 Sou. 788.

The doctrine in Mississippi may be illustrated by a quotation from the latter case. Says the court:

"Notwithstanding the good faith and honest purpose of both the men, in fact, still the law denounces a trust deed hampered by such an agreement or understanding (permitting the mortgagor to retain possession of the property and to sell a part thereof) as fraudulent and void as to creditors. The rule is a hard one, but it is too well settled by authority for us to disturb it. The understanding between Mr. Dre and Mr. Moore is the 'fly in the ointment' which vitiates the instrument, not only as to the logs, but also as to everything else conveyed by it, so far as creditors of the grantor are concerned, and this is thoroughly well settled by authority."

MISSOURI.

Independent Packing Co. vs. Barth (Mo.) 106 S. W. 1121-1123.

Apparently the Missouri court will not now follow the doctrine of *Bullien vs. Barrett*, 87 Mo. 185, and *In re: Kirkbride* (Mo.) 5 Dillon, 116, 118, cited in appellant's brief, since the recent case of *Independent Packing Co. vs. Barth*. Here the court has held that the mortgage is void on its face as to both the floating and stationary property, because it provided that the possession of the property should remain with the mortgagor, and it also appeared aliunde that the mortgagor was given power to dispose of and sell "the liquors described in the mortgage."

NEW YORK.

Russell vs. Winne, 37 N. Y. 501; 97 Am. Dec. 755.

Skillen vs. Endelman (N. Y. 11 Am. B. R. 766, 768.

Hedges vs. Polhemius, 30 N. Y. Sup. 556.

In re: Volence (N. Y.) 197 Fed. 232.

In the latter case the District Court for the Southern District of New York reviews New York's leading authorities upon the question, and quotes approvingly the language of *Russell vs. Winne*, as follows:

"I think it entirely settled that, if a mortgage be one which, by reason of the fraudulent purpose and intent with which it is executed, is declared void by the statute, it is wholly void, notwithstanding it

may include property as to which it would be valid if it could be regarded as a mortgage of that only. To speak more clearly, if a mortgage be given with the fraudulent intent to cover up and conceal from creditors a portion of the debtor's property, it is altogether void, notwithstanding it also includes land or other property in relation to which there is a bona fide intent to convey it as security for an honest debt, and no other purpose and intent. A mortgage, void in part as a violation of the statute, is void altogether."

SOUTH DAKOTA.

Greeley vs. Winsor (S. Dak.) 15 S. Dak. 117, 618; 45 N. W. 325, 326.

The South Dakota court in the above case follows the general trend of authority and what is believed to be the better doctrine, and bases its conclusions upon the following reasoning:

"The mortgage was upon 'goods, merchandise, furniture and fixtures.' The permission to sell covered only 'such goods as are sold in the usual course of retail trade.' Is the mortgage *prima facie* fraudulent *in toto*, or is it good as to the furniture and fixtures, they evidently not being included in the permission to sell? The law condemns such a mortgage as this, not because its terms prove any fraudulent or corrupt motive on the part of those who made or those who took it, but because such a mortgage furnished such easy facil-

ities for fraud, and is so well adapted to accomplish unfair and fraudulent results as to put it under the ban of suspicion. *It is condemned not because the transaction was inspired by a bad intent, but because it naturally leads to bad results.* If it were the actual proved intent of the parties which fixed the character of this instrument as fraudulent, it would hardly be contended that because they intended to and did reserve the furniture from the operation of this vicious power of sale, the mortgage ought to be held good as to them, but upon the familiar principle that every man must be presumed to have intended the natural and legitimate results of his acts, the law substitutes the effect for the intent, and it has found that the effect of such provisions is ordinarily bad, it assumes that the intent is ordinarily, or in other words, presumptively bad.

There are other reasons for applying this rule to the entire mortgage provisions in this case. The mortgagee, while claiming to have security upon all this property, has stipulated and consented that the mortgagor might gradually by retail sales deplete and consume the bulk of his security, leaving the burden of the debt, not upon the entire property, which he pretends to hold under, and which he protects by his mortgage, but upon the furniture and fixtures which alone, of all the mortgaged property, is to remain under the lien of his mortgage, and must constitute his real ^{security} property." (Italics ours)

It may not be amiss, in passing, to state that the latter reason assigned is in conformity with the view

of Dean Bigelow, expressed in his work on the Law of Fraudulent Conveyances (1911). This eminent writer is of the opinion that the better authority is that adopted by the court below, from which this appeal has been taken. Says Dean Bigelow, page 294 (note):

“It is not necessary that the debtor should be able to sell the whole property for his own use to make a case of fraudulent intent, if he can sell or dispose of any of it, that is enough,”

and then (returning to the text) says:

“The favored creditor has not been paid, and still calls for payment out of the property mortgaged . . . That is to say, he has allowed the debtor to have to his own benefit part of the property within the lien, when that might have been enough to pay the debt, and yet required the other creditors to stay their hands until he can make good his claim out of what is left. All that is in contemplation when the mortgage was executed—for it is the natural effect of the terms of the mortgage.”

TENNESSEE.

Bank of Rome vs. Haselton, 15 Lea. 216, 238.

Bank vs. Brier, 95 Tenn. 331, 338.

Somerville vs. Horton, 4 Yerger (Tenn.) 541;
26 Am. Dec. 242, 246.

The doctrine in Tennessee has already been adverted to and the decision in the case of *Bank of Rome vs. Haselton* has been quoted at great length, and need be merely referred to in this connection.

KANSAS, NEW JERSEY, WEST VIRGINIA.

Wallach vs. Wiley, 28 Kans. 97, 107.

Holt vs. Kremer, 34 N. J. Eq., 181, 187.

Chafin vs. Foley, 22 W. Va. 434, 441.

The cases in these states, while not so thoroughly considered as in the states above mentioned, yet hold the doctrine that a mortgage void in part is wholly void.

From the above discussion it may be seen that in all the states the basis for holding that a mortgage of the kind under discussion is void, is primarily that it was fraudulently entered into, and the majority of the cases hold that this fraud is conclusive because of the pernicious effect of permitting a mortgagor to continue in the use of property with power of sale thereof, or any part thereof, without applying the proceeds upon the mortgage indebtedness, and at the same time enabling the mortgagor to place his property beyond the reach of his general creditors. All the courts, among them, the Supreme Court of Oregon, that hold to such a view, that have passed upon the question as to whether a mortgage may be void in part without being void totally, have held to the effect that a mortgage void in part must be totally void, and this conclusion must of necessity follow, if the

premise be conceded, that a mortgage which permits the mortgagor to continue in the possession of property with unlimited power of sale thereof, without an accounting, is fraudulent as to the creditors, because of the conclusively presumed intent with which the mortgage was entered into. If the mortgage is fraudulent and void at its inception, the property covered thereby is not capable of being segregated into void parcels and valid parcels. The *mortgage* is void. And that this is the law in Oregon is apparent. For example, the court, in the case of *Bremer & Co. vs. Fleckenstein & Mayer*, 9 Ore. 266, 273, in speaking of such a provision, and after concluding that the mortgage is fraudulent and void as to the creditors, says:

“And yet its obvious effect was to ward off his creditors and hinder and delay the collection of their demands against them, and the appellants must be presumed to have so *intended*. We have no hesitation in declaring such an arrangement as a fraud upon the creditors, and cannot be upheld.”

It is submitted, therefore, without further prolonging this brief, that the mortgage in this matter is void *ab initio*, and being void *ab initio*, the invalidity thereof inheres of necessity in all of it, and that it must of necessity be void in toto.

The appellant states, on page 29 of his brief, that all the cases in accord with the doctrine of *Russell vs. Winne*, 37 N. Y. 591, are either cases of actual fraud as distinguished from constructive fraud, or cases which practically “without comment” follow these cases as an authority, and further states that most of the cases show actual fraud, citing *Wilson vs. Voight*, 9 Colo. 614, 619, *Greeley vs. Winsor*, 1 S. Dak. 117, 122, and another case.

Neither of these two cases cited show any “actual” fraud, and both of them specifically negative “actual” fraud.

That the cases in accord with *Russell vs. Winne* do not follow that authority without “comment” (which is assumed to mean “reasoning”) is demonstrated by a mere perusal of so much of the opinions as are quoted herein.

In fact, the logical discussion of many of the cases in accord with *Russell vs. Winne* is so cogent and forcible that counsel for appellee in this brief deems it unnecessary to append even a resume thereof, nor to encumber this brief with language of his own which could not be as convincing as the excerpts which have been inserted under appropriate headings herein.

We will, therefore, close this brief with one or two observations as to certain phases of appellants argument.

Reference is made in appellant's brief to the case of *Etheridge vs. Sperry*, 139 U. S. 266, 271, in such a manner as, unwittingly, of course, to leave an impression that this case holds in accordance with appellant's present contention. As a matter of fact, the question of void in part, void in toto, did not in any way arise, all of the property mortgaged being shifting in character with unrestricted right of possession and sale by the mortgagor. The Iowa courts had held in accordance with the Oregon doctrine and the Supreme Court of the United States followed these decisions (the case arising in Iowa) though indicating that if the proposition were an original one and the court were not bound by the state decisions, it would have reached a different conclusion.

In commenting upon the case of *Bremer & Co. vs. Fleckenstein & Mayer*, appellant calls attention to the fact that in the lower court the proceeds of the sale of the shifting stock were segregated from the proceeds of sale of the stationary fixtures, and Bremer's recovery was confined to the sum of \$200.00, representing the proceeds of the sale of the shifting stock, whereas, Bremer's claim was for the amount of \$289.00. Appellant then asks, *arguendo*, at page 16 of its brief, "If the Supreme Court thought the mortgage void in toto, why did it not permit Bremer & Company to recover the full amount of its judgment instead of limiting it to the amount at which the stock of goods was valued? Why did they not recover \$289.00 instead of simply \$200.00?" And appellant thereupon states that he sees no explan-

ation other than that the court approved of the segregation of the void from what appellant thinks was the valid. As a matter of fact, the explanation was not far to seek. It was distinctly pointed out to the appellant in the opinion of Judge Wolverton in the instant case. The appeal in the case of *Bremer vs. Fleckenstein* was taken by Fleckenstein. Bremer was apparently satisfied with the \$200.00 recovery and did not file any cross appeal, hence, the Supreme Court of Oregon, under the Oregon practice, had no jurisdiction to award any larger sum to Bremer than that which he procured in the court below. (See opinion of Judge Wolverton, Printed Transcript of Record, pages 32-35.)

It may be also noted *passim*, that the doctrine in the instant case has been heretofore held to be the law of Oregon by the United States District Court for the District of Oregon in at least two cases, both of which, unfortunately, are unreported. We refer to the cases of

In re: *M. Klorfein, Bankrupt* (In Bankruptcy No. 2250).

In re: *Snyder, Bankrupt* (In Bankruptcy No. 2275).

The occupants of the United States District Court bench in Oregon have both rendered illustrious service as members of the Supreme Court of the State of Oregon, and we assume that it will not be deemed amiss to refer to this fact in view of the rule followed by the United States courts of adopting, in questions such as

that here involved, the law as it exists in the state in which the case arises.

Respectfully submitted,

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